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Harry W. Arthurs

Osgoode Hall Law School of York University, harthurs@osgoode.yorku.ca

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"THE DULLEST BILL": REFLECTIONS ON THE LABOUR CODE OF BRITISH COLUMBIA

H. W. ARTHURS†

[I]f you went over the history of the labour legislation of this Province, this is the dumbest bill that has ever gone through the legislature as far as opposition goes. . . . [T]his bill is being accepted as a real honest attempt to solve the problems.¹

I. INTRODUCTION

The Labour Code of British Columbia² may or may not have generated the intensity of debate over labour relations policy which has characterised much of the political history of that province. But if "the dumbest bill" was lacking in political titillation, its enactment at least marks an important milestone in the evolution of Canadian labour law.

The Code represents the logical extrapolation of recent legislative experiments in other provinces³ and at the federal level,⁴ as well as the first attempt to give effect to certain recommendations of such dissimilar bodies as the 1968 Rand Commission in Ontario,⁵ and

† B.A., LL.B., LL.M., Professor and Dean, Osgoode Hall Law School, York University, Toronto.

I gratefully acknowledge the efforts of my colleagues, Peter Hogg and particularly George Adams, and of my research assistant, Janice Baker, to prevent me from committing errors and uttering follies.

¹ Hon. L. T. Nimsick, Minister of Mines and Petroleum Resources (1973) *BRITISH COLUMBIA LEGISLATIVE ASSEMBLY DEBATES*, at 464; hereinafter referred to as *DEBATES*.

² Labour Code of British Columbia Act, S.B.C. 1973, c. 122 (Bill 11, assented to 7 November 1973), hereinafter referred to as "the Code".

³ Principally Manitoba Labour Relations Act, S.M. 1972, c. 75; Ontario Labour Relations Act, R.S.O. 1970, c. 232; Saskatchewan Trade Union Act, S.S. 1972, c. 137.

⁴ Canada Labour Code, R.S.C. 1970, c. L-1, as am. by S.C. 1972, c. 18.

⁵ *REPORT OF THE ROYAL COMMISSION INQUIRY INTO LABOUR DISPUTES* (the "Rand Report") (1968).

the 1969 federal Task Force on Industrial Relations.⁶ It contains, moreover, some unique features which, if proven effective over the years, will no doubt in turn influence legislators across the country. Above all, the Code places squarely in issue the future of Canadian courts in labour relations — both as primary actors in the regulation of strikes and picketing through the use of damages and injunctions, and in their secondary role in reviewing decisions of labour relations boards and arbitrators. For all of these reasons, the Code invites reflection.

Reflection, of course, is no substitute for the careful analysis that can only come after the statute has operated for a time in the real world of industrial relations. The changing seasons of economic growth and decline, the unpredictable climates of provincial, national and international politics, social stability and turmoil, the kaleidoscopic procession of personalities and institutions, will all test the Code in due course. But now, at its inception, only reflection is possible; this note will have to be largely descriptive and speculative.

II. THE EVOLVING SUBSTANTIVE LAW OF LABOUR RELATIONS

In terms of substantive law, the Code makes many important, but very few fundamental, changes in the existing rules. As will be seen, many of these changes have been foreshadowed by similar changes in federal and provincial legislation. As will also be seen, many of the more striking departures in the legislation are to be found in connection with the enhanced role of the Labour Relations Board and of other administrative agencies, and with the diminished role of the courts, a topic explored more fully in the third part of this note.

A. *The Coverage of the Statute*

The Code brings within the regime of collective bargaining several groups which had formerly been denied its protections and relieved of its responsibilities. "Dependent contractors" and supervisory employees are now permitted to bargain collectively. The first group is broadly defined to embrace any individual

who performs work or services for another person . . . on such terms and conditions that he is . . . in a position of economic dependence upon . . .

⁶ CANADIAN INDUSTRIAL RELATIONS: THE REPORT OF THE FEDERAL TASK FORCE ON LABOUR RELATIONS (the "Woods Report") (1968).

that person more closely resembling the relationship of an employee than that of an independent contractor. . . .⁷

Such individuals may be included within bargaining units when

- (a) a majority of [them] consent to representation by the trade-union; and
- (b) reasonable procedures have been developed to integrate dependent contractors into the bargaining unit.⁸

Interestingly, however, the Code appears to protect only those dependent contractors who have been brought within a bargaining unit in this fashion. Unlike the Canada Labour Code,⁹ dependent contractors are not simply treated as a species of employee unless they have been included in a bargaining unit by the Labour Relations Board.¹⁰ Accordingly, in British Columbia, dependent contractors do not appear to enjoy protection against unfair labour practices which may occur prior to the establishment of a bargaining unit, nor are they able to band together in a bargaining unit composed solely of dependent contractors.

Supervisory employees, however, may be included either within an all-employee unit or within a unit composed entirely of supervisors.¹¹ In either case, the statute appears to draw a line between such employees and persons "employed for the primary purpose of exercising management functions over other employees," the latter group being excluded from "employee" rights in British Columbia¹² as they are, typically, in other Canadian jurisdictions.¹³

A third group brought within the regime of collective bargaining is policemen.¹⁴ However, as will be seen, the disputes of policemen and other public safety workers may be settled through voluntary arbitration, rather than by economic conflict.¹⁵

⁷ The Code, s. 1(1). This definition provoked an extended legislative debate, concerned principally with the issue of whether someone who himself employed other individuals might be considered a "dependent contractor". The potential application of this section in the woods industry was explored by several opposition spokesmen. See *DEBATES, supra*, note 1, at 694 *et seq.*

⁸ The Code, s. 48.

⁹ Canada Labour Code, *supra*, note 4, s. 107(1).

¹⁰ The Code, s. 1(1).

¹¹ *Id.*, s. 47.

¹² *Id.*, s. 1(1).

¹³ See, e.g., Canada Labour Code, *supra*, note 4, s. 107; Manitoba Labour Relations Act, *supra*, note 3, s. 1(k); Ontario Labour Relations Act, *id.*, s. 1(3)(b); Saskatchewan Trade Union Act, *id.*, s. 2(f)(i).

¹⁴ The Code, s. 1(1).

¹⁵ *Id.*, s. 73.

Somewhat surprisingly, the Code does not follow the trend developing elsewhere in the country of including some or all of the professions within its reach.¹⁶ Indeed, the professional exclusion in British Columbia would appear to be somewhat broader than it is elsewhere. Equally, it should be noted that public servants in British Columbia are treated under a separate, although interlocking, statute¹⁷ rather than under the basic private sector statute as in Quebec, Saskatchewan, and Manitoba.¹³ What the new Code does not do, then, is in a sense more significant than what it does do in this area.

B. The Acquisition of Bargaining Rights

No fundamental departures are made in this area from the prevailing pattern of Canadian legislation. In British Columbia, as elsewhere, a union may seek bargaining rights by asking the employer to recognize it voluntarily, and without benefit of formal sanction by the Labour Relations Board. However, unlike the Ontario act,¹⁹ for example, the new Code makes no explicit provision for the voluntary recognition of a trade union by an employer, although this possibility is implicitly recognized.²⁰ Following the expiry of a first agreement, either party is entitled to serve notice for renegotiation,²¹ without regard to whether or not the union's bargaining authority rests on a certificate.²² While these arrangements may be agreeable to the contracting parties, *inter se*, it should be noted that the Code provides no mechanism whereby employees who wish to challenge

¹⁶ See, e.g., Canada Labour Code, *supra*, note 4, ss. 107(1), 125(3); Manitoba Labour Relations Act, *supra*, note 3, ss. 1(t), 29(3); Ontario Labour Relations Act, *id.*, ss. 1(1)(1), 6(3); Quebec Labour Code, R.S.Q. 1964, c. 141, s. 20, am. by S.Q. 1965, c. 50, s. 2, S.Q. 1969, c. 47, s. 9, S.Q. 1970, c. 33, s. 1 and S.Q. 1971, c. 44, s. 1; Saskatchewan Trade Union Act, *supra*, note 3, s. 2(f)(ii).

¹⁷ Public Service Labour Relations Act, S.B.C. 1973, c. 144.

¹⁸ See Saskatchewan Trade Union Act, *supra*, note 3, s. 2(f), (g). In Quebec, public servants are governed by the Labour Code, *supra*, note 16, am. by S.Q. 1969, c. 47, interlocked with the Civil Service Act, S.Q. 1965, c. 14, am. by the Civil Service Department Act, S.Q. 1969, c. 14. S. 3 of the Manitoba Labour Relations Act, *supra*, note 3, binds the Crown, but s. 4(3) makes the Act subject to the Civil Service Act, R.S.M. 1970, c. C-110, which includes provisions for collective bargaining and interest arbitration in ss. 47-56.

¹⁹ Ontario Labour Relations Act, *supra*, note 3, s. 38(4).

²⁰ Sections 39(2)(b)(i) and 46(c) of the Code both contemplate an application for certification by a union which has already executed an agreement on the basis of voluntary recognition.

²¹ *Id.*, s. 62.

²² *Id.*, s. 63.

the union's right to represent them may do so.²³ Indeed, whereas in Ontario a collective agreement meets the statutory definition only if it has been consummated by "a trade union that . . . represents employees of the employer,"²⁴ no similar requirement is found in the definition of a "collective agreement" in British Columbia.²⁵ In Ontario,²⁶ but not in British Columbia,²⁷ moreover, the right of a voluntary recognized union to negotiate union security arrangements is severely limited. Thus, the Code leaves open the possibility of collusive arrangements between an employer and a union, or at least of arrangements which do not originate in the authentic desire of the employees for representation by the union claiming to act on their behalf.

But these cases of voluntary recognition, whether authentic or illicit, are not likely to be the norm. For the most part, employees will be represented by bargaining agents, freely selected by them, through procedures administered by the board. As in all other Canadian jurisdictions, once this selection process has taken place, the focus of attention shifts to the establishment of collective bargaining relationships which are stabilized for a period of time after their commencement. During this period, the right of employees to alter their bargaining representative is suspended.²⁸ However, the moment at which employees are once again permitted to exercise their freedom to select a new bargaining agent is to arrive rather earlier in British Columbia than, for example, in Ontario.²⁹

This promise of greater flexibility is reflected elsewhere in the provisions dealing with bargaining rights. For example, craft or technical bargaining units are to be established essentially upon request, although subject to subsequent annexation (with the consent of a majority of the craft employees) to a larger unit.³⁰

In circumstances where the board is unable to hold a representation vote because of circumstances making it impossible to ascertain the true wishes of the employees, the board may nonetheless certify

²³ Cf. Ontario Labour Relations Act, *supra*, note 3, s. 52.

²⁴ *Id.*, s. 1(1)(e); see *United Steelworkers of America v. Niagara Crushed Stone (Humberstone) Ltd.* (1958) 58 C.L.L.C. para. 16,118 (O.L.R.B.).

²⁵ The Code, s. 1(1).

²⁶ Ontario Labour Relations Act, *supra*, note 3, s. 38(4).

²⁷ The Code, s. 9.

²⁸ *Id.*, s. 39.

²⁹ Labour Relations Act, *supra*, note 3, s. 5' (one year as compared to six months in British Columbia).

³⁰ The Code, s. 41.

the trade union, but impose upon it conditions which are required to be substantially fulfilled within a fixed period following certification, failing which, certification is deemed to be cancelled.³¹ Presumably, the conditions are intended to safeguard the interests of the employees who thus come to be represented by a union which they have never chosen. For example, the union might be required to persuade a given percentage of employees to become members within a fixed period of time following certification; upon nonperformance of this obligation, its bargaining rights would lapse, since a union without employee support has no real future as a bargaining agent.³²

In keeping with the general trend of Canadian legislation the Code provides that associated or related employers may be treated as a single employer,³³ that two or more unrelated employers can be so regarded,³⁴ and that an employers' association may apply to be accredited as the bargaining agent for a number of firms.³⁵ All of these provisions have counterparts in other Canadian labour statutes; all respond to the admonition of the federal Task Force Report which favoured both greater flexibility and potentially greater centralization of bargaining.³⁶

Unlike Ontario, and several other provinces, which have adopted the accreditation device, British Columbia does not confine its application to the construction industry. However, in another sense the British Columbia legislation is much more restrictive, since accreditation would appear to vest the accredited association with bargaining authority only for its members or for those who agree that it should act as their spokesman. By contrast, in Ontario, an accredited association has the authority to speak for all unionized employers in a particular industrial sector or geographic area.³⁷ Whether accreditation, thus limited, adds significantly to the authoritative status of employers' associations is problematic.³⁸

Certainly the particular problems of the construction industry,

³¹ *Id.*, ss. 8(4)(e), 43(3).

³² See *International Brotherhood of Boilermakers, Lodge 359 and Forano Ltd.* [1974] 1 CANADIAN L.R.B.R. 13, at 19-22 (B.C. L.R.B.) for an analysis of the objectives and criteria of this section.

³³ The Code, s. 37.

³⁴ *Id.*, s. 40.

³⁵ *Id.*, s. 59.

³⁶ *Supra*, note 6, paras. 193-203, 530-34, 549-52.

³⁷ Ontario Labour Relations Act, *supra*, note 3, s. 113.

³⁸ Crispo and Arthurs, *Countervailing Employer Power: Accreditation of Contractor Associations*, in Goldenberg and Crispo, eds., *CONSTRUCTION LABOUR RELATIONS* (1968) 376.

which elsewhere are regarded as the primary reason for introducing accreditation,³⁹ are not specifically dealt with in any definitive fashion by the new Code. Perhaps the contemplated Construction Industry Advisory Council⁴⁰ will lead to a clearer focus within the administration of the legislation upon the special problems flowing from the unusual rhythm of employment within that industry.

A final point of some significance is that a union may win bargaining rights by demonstrating either that a majority of the employees in a bargaining unit are its members or that a majority "wish to be represented by the trade-union."⁴¹ These two grounds for certification are treated in somewhat disparate fashion, although not entirely so. When the union is able to show membership of between thirty-five and fifty percent, the board must hold a confirmatory representation vote,⁴² presumably so the union can muster a majority composed partly of members and partly of non-member supporters. By contrast, in Ontario, the vote must be held unless the union can demonstrate a majority of not merely fifty, but of sixty-five percent,⁴³ a much more stringent requirement.

But the board may also conduct a representation vote "in any case."⁴⁴ This section enables the board to hold a vote when the union's membership exceeds fifty percent, but where its claim to majority status⁴⁵ is nonetheless impugned.

In either case, the board has ruled, the union is required merely to secure a majority of those actually voting rather than of all eligible voters.⁴⁶ In so doing, the board brushed aside what appears to be a specific admonition of the Code that it be "satisfied that *a majority of the employees in the unit . . . wish to be represented*"⁴⁷ by the union, holding:

[T]he language of s. 45, read in the context of the rest of Part III of the Code, leaves the Board a great deal of flexibility in the use it can

³⁹ Bain, *INDUSTRIAL RELATIONS LEGISLATION AND THE MANITOBA CONSTRUCTION INDUSTRY* (1971).

⁴⁰ The Code, s. 124.

⁴¹ *Id.*, s. 45(1).

⁴² *Id.*, s. 43(2).

⁴³ Ontario Labour Relations Act, *supra*, note 3, s. 7(2).

⁴⁴ The Code, s. 43(1).

⁴⁵ *Id.*, s. 45(1).

⁴⁶ *Canadian Association of Industrial, Mechanical and Allied Workers v. Noranda Metals Industries Ltd.* [1974] 1 CANADIAN L.R.B.R. 115 (B.C. L.R.B.).

⁴⁷ The Code, s. 45(1).

make of representation votes in satisfying itself as to whether "a majority wish to be represented by the trade-union". If that is so, then *a fortiori* the Board is not rigidly bound by a legal rule that a union must secure a majority of all eligible voters as a condition precedent to certification.⁴⁸

Subsequently, the board's view of the majority requirement was adopted by a clarifying amendment to the statute.^{48a}

On balance, it is difficult to predict whether the British Columbia arrangements are more likely to help unions win bargaining rights than those in Ontario. The Ontario experience suggests that unions overwhelmingly prefer to seek certification on the basis of membership rather than of representation votes⁴⁹ and the lower membership threshold would thus seem to promote unionization. However, how many Ontario unions are stranded between the fifty and sixty-five percent membership marks is not known; the marginal utility to unions of the lower requirement therefore cannot be assessed.

In sum, all of these departures from prevailing Canadian legislative patterns can be described as "fine tuning". They should help, to some modest degree, to facilitate the application of the Code's procedural arrangements to the varied circumstances in which employees may lay claim to bargaining rights. But they do not *per se* fundamentally change the position of either labour or management in British Columbia.

Finally, it must be said that a close reading of the provisions of the Code relating to certification discloses a number of technical discrepancies and inconsistencies, some of which were explored in the board's early decision in *Canadian Association of Industrial etc. Workers v. Western Canada Steel, Ltd.*⁵⁰ In that case, the board took the position that it had a commitment to make the legislation work:

In interpreting these sections, we must take a realistic view of the nature of complicated provisions which have accumulated over a long period of time. This whole body of law was substantially revised in the fall of 1973. It is only natural to find that the draftsman may not have anti-

⁴⁸ *Supra*, note 46, at 118.

^{48a} Statute Law Amendment Act, S.B.C. 1974, c. 87, s. 22 (Bill 162).

⁴⁹ Annual statistics in Ontario show that from 1968-1971, unions sought certification on the basis of membership (rather than by representation vote) in 85-90% of all applications. In 1971, the Ontario Act was amended, requiring union to prove 65% membership rather than the former 55%. Following 1971, certifications sought on the basis of membership declined slightly to about 80% of all applications.

⁵⁰ *Canadian Association of Industrial, Mechanical and Allied Workers, Local 1 (B.C.) et al. and Western Canada Steel Limited et al.* [1974] 1 CANADIAN L.R.B.R. 22 (B.C. L.R.B.).

pated the effect of his major changes on every other related provision in the Code. We can expect to find a great many situations in which, on their face at least, different parts of the Code may not fit perfectly together. It is up to a tribunal such as this one, charged with the task of administering the whole Code and thus seeing these unanticipated cases as they appear one by one, to try to smooth off the rough edges in the legislation to the extent this is legally permissible. The basic lines of the legislative scheme must always be kept at the fore in the interpretation of the detailed clauses. The ample discretion which has been conferred on the Board must always be exercised in a way which sees that the statutory policy is respected in individual cases.⁵¹

These sections may well be viewed as a proving ground for the creative craftsmanship of the board, as well as for the government's announced policy of avoiding legalism in the administration of its labour legislation. But while both the board and the government may wish to shelter from judicial review behind the Code's privative clauses, it must not be forgotten that speedy legislative correction of errors is the *quid pro quo* for the exclusion of the courts.⁵²

C. *Protecting the Right to Organize*

If the new procedural arrangements for winning bargaining rights represent no radical departure, the Code's attempt to guarantee the rights of workers to organize for collective bargaining is slightly more far-reaching.

The basic rights and protections are couched in familiar terms: the freedom to be a member of a trade union and to participate in its lawful activities;⁵³ protection against discrimination or discharge designed to interfere with such rights;⁵⁴ guarantees of the independence of trade unions from employer interference.⁵⁵ However, the new Code also specifically outlaws a number of employer unfair labour practices which were formerly prohibited only inferentially, if at all: the promise or introduction of a wage increase either during the union's organizing campaign,⁵⁶ or after it has won bargaining

⁵¹ *Id.*, at 25.

⁵² As the Hon. W. S. King, Minister of Labour, *supra*, note 1, at 1047, stated: In terms of the powers of the board, I would suggest that the Legislature certainly sits every year. Any question or inference of unbridled powers without checks and balances are always subject to review in this Legislature, which is the highest law-making agency in the land.

⁵³ The Code, s. 2(1).

⁵⁴ *Id.*, s. 3(2).

⁵⁵ *Id.*, s. 3(1).

⁵⁶ *Id.*, ss. 3(2)(c), 51(1).

rights during negotiations;⁵⁷ interference with lawful concerted action designed to promote organization;⁵⁸ and denial of access to employees who reside on property owned or controlled by their employer.⁵⁹ None of these provisions takes British Columbia farther than many other jurisdictions have gone as a result of either labour board interpretation or statutory enactment.

To avoid any doubt on the matter, the Code specifically preserves the employer's residual rights to discipline or lay off employees for proper cause,⁶⁰ to control the place of employment during working hours,⁶¹ and ultimately to suspend or discontinue operations for reasons unconnected with collective bargaining.⁶² Somewhat surprisingly, in view of the Code's concern to protect the freedom of speech of workers,⁶³ the government declined to define the scope of legitimate employer appeals to his employees, as has been done in Ontario.⁶⁴ Recent research casts some doubt upon the coercive effect — indeed upon the efficacy — of employer appeals.⁶⁵ However, it is clear that the government's intention was neither to adopt a regime of *laissez faire*, nor to make "an employer's absolute rights implicit in the legislation," but rather to permit the board to "weigh any legitimate employer interests."⁶⁶ This approach was promptly adopted by the board which issued a total prohibition against any employer appeals pending a representation vote ordered against the background of a series of unfair labour practices.⁶⁷

The Code's real innovations are to be found in the arsenal of remedies made available to the Labour Relations Board. As under the former Act, the board has broad power to direct that offending

⁵⁷ *Id.*, s. 61(1)(c).

⁵⁸ *Id.*, s. 3(2)(f).

⁵⁹ *Id.*, s. 4(4).

⁶⁰ *Id.*, ss. 3(2), 51(2), 61(3).

⁶¹ *Id.*, s. 4(1).

⁶² *Id.*, s. 83(1).

⁶³ *Id.*, s. 84. The section relates to appeals by means other than picketing which "communicate information to any person . . . as to matters . . . relating to terms or conditions of employment or work . . . to be done by that person," a definition theoretically broad enough to encompass employer communication, although clearly not intended to do so.

⁶⁴ Ontario Labour Relations Act, *supra*, note 3, s. 56. An opposition attempt to secure a similar "free speech" proviso was rebuffed; *DEBATES, supra*, note 1, 817-19.

⁶⁵ See Getman and Goldberg, *The Myth of Labor Board Expertise* (1972) 39 U. CHI. L. REV. 681.

⁶⁶ Hon. W. S. King, Minister of Labour, *DEBATES, supra*, note 1, at 818.

⁶⁷ *Supra*, note 32.

conduct cease, that its effect be rectified, and that any monetary loss to injured employees be made good.⁶⁸ It may rely upon presumptions or reverse onuses to make findings of illegal employer motive which might otherwise be impossible to prove,⁶⁹ and it now has power as well to require the employer to restore illegally altered working conditions.⁷⁰ These remedies, however, are liable to be frustrated by an intransigent employer who is clever enough to escape detection, stubborn enough to litigate many individual unfair practice proceedings, or tough enough to force a union to an impasse in bargaining for a first agreement. Such time-consuming and demoralizing tactics may well succeed in depriving a newly-organized, insecure union of employee support or provoking it into rash reprisals. Of such stuff are the most intractable labour disputes often made. The Code makes two important new remedies available in such situations.

First, the board may certify the union although a true expression of employee sentiment has been made impossible by employer unfair labour practices.⁷¹ In this respect, the Code goes further than other statutes which only permit certification in like circumstances if the union has, at some point, been able to muster majority support.⁷² The British Columbia rule is obviously preferable since it deprives an employer of any incentive to move early against a union in order to forestall a membership drive. Nonetheless, the board has indicated that it will exercise its new-found power cautiously, at least in situations where the complainant union is unable to show that "the original momentum of the campaign made a majority very likely," where "certification would be just a futile gesture" because of the union's fragility, and where another union with better prospects of survival is waiting in the wings.⁷³

Second, the board has a unique power to impose a first collective agreement upon the parties.⁷⁴ This prospect should discourage em-

⁶⁸ The Code, s. 8(4)(a)-(c).

⁶⁹ *Id.*, ss. 8(7), 83(2). See *DEBATES*, *supra*, note 1, at 825-28, on opposition to the reverse onus in s. 8(7). There was no debate on s. 83(2). The Quebec Labour Code, *supra*, note 16, contains a similar provision in s. 16.

⁷⁰ The Code, s. 8(4)(d).

⁷¹ *Id.*, ss. 8(4)(e), 43(3).

⁷² *Cf.*, Ontario Labour Relations Act, *supra*, note 3, s. 7(4).

⁷³ *Supra*, note 32, at 21-2.

⁷⁴ The Code, ss. 70, 71. See *Wholesale and Retail Delivery Drivers Union v. London Drugs Ltd.* [1974] 1 CANADIAN L.R.B.R. 140 (B.C. L.R.B.), in which the board analyzed the purpose of "this unusual device" as remedying "the variety of methods by which *bona fide* and reasonable collective bargaining may be frustrated."

ployer intransigence in bargaining premised on the belief that a newly-certified union will lose the loyalty of its members if it cannot quickly secure an agreement for them. Presumably, too, the device can be used to rescue an employer from the unrealistic expectations of novice union negotiators. However, the new section does represent a sharp departure from the traditional N.D.P. philosophy that the outcome of collective bargaining should be determined by an economic contest, rather than by legal intervention. As such, it attracted the principled opposition of some unionists and even labour-supported government members. As one stated:

I campaigned against compulsory arbitration. . . . I cannot accept a provision that in any way allows for compulsory arbitration, even though in this case that compulsory arbitration appears to be in favour of the trade union movement. . . .⁷⁵

D. *The Collective Bargaining Process*

Good faith is so central to the process of collective bargaining that it is written into the very definition of "collective bargaining" in the new Code.⁷⁶ The statute also provides both an affirmative duty to bargain in a good faith,⁷⁷ and a specific sanction for breach of that duty:

No trade-union or employer shall fail or refuse to bargain collectively *in good faith* . . . and to make every reasonable effort to conclude a collective agreement. . . .⁷⁸

Breach of this prohibition is an unfair labour practice, giving rise to the remedial intervention of the board already described.

Moreover, it should be noted that "the extent to which the parties have, or have not, bargained in good faith" is "among other things" a matter the board "may take into account" in imposing a first collective agreement on the parties.⁷⁹ Thus, the board appears to have the right to impose compulsory arbitration even where there has been good faith bargaining.⁸⁰ But despite this possibility, it seems

⁷⁵ C. S. Gabelmann (N.D.P., North Vancouver-Seymour), *DEBATES, supra*, note 1, 457. Mr. Gabelmann and Mr. Steves (N.D.P., Richmond) both voted against s. 70 in the Committee stage of the Bill; *id.*, at 996.

⁷⁶ The Code, s. 1(1).

⁷⁷ *Id.*, s. 63.

⁷⁸ *Id.*, s. 6 [emphasis added].

⁷⁹ *Id.*, s. 71.

⁸⁰ Hon. W. S. King, Minister of Labour, *DEBATES, supra*, note 1, at 517: [W]e cannot be so doctrinaire . . . in our attitude and our lip service to free collective bargaining as the appropriate and usual way of regulating

paradoxically inevitable that the board will be drawn even more deeply than other Canadian labour relations boards into the thankless task of defining "good faith" in the context of collective bargaining.⁸¹ On the one hand, British Columbia now has what all other Canadian jurisdictions lack — an effective remedy for intransigence and bad faith, at least in connection with negotiations for a first agreement. On the other hand, the very attractiveness of the remedy may soon produce a deluge of complaints unless the board can develop restrictive guidelines for its use: "good faith" seems likely to be the talisman for employers resisting compulsory arbitration of first collective agreements.⁸²

The Code by no means depends solely on sanctions to promote collective bargaining. An orderly and standardized timetable is provided for negotiations. Notice to bargain may be served four months prior to the expiry of an agreement, and is automatically deemed to have been served sixty days prior to expiry;⁸³ even agreements for lengthy terms may be reopened (with ministerial approval) three months prior to any anniversary date, unless the parties agree in advance to the contrary.⁸⁴ The labour minister is to be given notice of all negotiations from their inception,⁸⁵ and may proffer mediation services upon the request of the parties, or "at any time . . . where he is of the opinion that [mediation] is likely to contribute to more harmonious industrial relationships between the parties."⁸⁶ Reasonable despatch is assured by a requirement that the parties meet within ten days after notice to bargain is given,⁸⁷ by the absence of any minimum period before mediation can be invoked, and by the requirement that the mediator very rapidly report back to the minister, unless the parties agree to extend his mandate.⁸⁸

these affairs and at the same time turn a blind eye to a situation where a new and usually weak unit, often composed of females, who perhaps haven't got the economic muscle that the major unions have, suffers and is denied the right to enjoy a collective agreement which is implied by the certification in the first instance. . . .

See also his comments, *id.*, at 995.

⁸¹ Cf., Palmer, *The Myth of "Good Faith" in Collective Bargaining* (1966) ALTA. L. REV. 409; Cox, *The Duty to Bargain in Good Faith* (1958) 71 HARV. L. REV. 1401.

⁸² See *Delivery Drivers Union v. London Drugs*, *supra*, note 74, where the board indicated it would take a similar approach.

⁸³ The Code, s. 62.

⁸⁴ *Id.*, s. 66.

⁸⁵ *Id.*, s. 62(2).

⁸⁶ *Id.*, s. 69(2).

⁸⁷ *Id.*, s. 63.

⁸⁸ *Id.*, s. 69(3).

Unfortunately, the Code fails to define the mediator's functions,⁸⁹ although his general objective, as noted, is "to contribute to more harmonious industrial relationships between the parties." The significance of this failure is suggested by contrasting the two alternative methods of reporting provided by the legislation. In the absence of contrary instructions, the mediator is to report "setting out the matters upon which the parties have and have not agreed;"⁹⁰ however, upon the request of either party, and subject to ministerial direction, his report must "include recommended terms of settlement."⁹¹ As the literature amply records,⁹² the latter "normative" style of mediation is apt to focus the attention of the parties on "building a record" and "making a case," rather than on the exchange of concessions which is more conducive to settlement. The former method implies that the parties are free to move towards each other without the risk that their positions will be criticized, or even further compromised, by a subsequent report, albeit one which is not legally binding.

What is to be done with a report containing recommended terms of settlement is not clear. The minister is himself empowered to "receive and hold in confidence a proposal made by any of the parties for the settlement of a dispute or difference."⁹³ Employees of the Department of Labour (including mediators) are, somewhat less specifically, authorized to retain information which "shall not be open to inspection by any person or any court."⁹⁴ While the minister retains the right not to disclose, or to partially disclose, "information [which] relates to the business or affairs of any person . . . disclosure of [which] would be prejudicial,"⁹⁵ the fact remains that there is no clear indication of whether the position of the parties

⁸⁹ Cf., Ontario Labour Relations Act, *supra*, note 3, s. 17(1), where a conciliation officer is directed to "confer with the parties and endeavour to effect a collective agreement." The Hon. Mr. King pointed to mediation as a face-saving device for the parties; DEBATES, *supra*, note 1, at 993.

⁹⁰ The Code, s. 69(3).

⁹¹ *Id.*, s. 69(4).

⁹² See generally, Logan, STATE INTERVENTION AND ASSISTANCE IN COLLECTIVE BARGAINING: THE CANADIAN EXPERIENCE 1943-1954 (1956); Phillips, *Government Conciliation in Labour Disputes: Some Recent Experiences in Ontario* (1956) 22 CAN. J. ECON. 523; Levinson, *Compulsory Conciliation Machinery in Ontario* (1958) 1 OSGOODE HALL L.J. 47; Taylor, *Conciliation* [1954] LECTURES L.S.U.C. 113; Fuller, *Mediation: Its Forms and Functions* (1971) 44 S. CAL. L. REV. 305.

⁹³ The Code, s. 127(1).

⁹⁴ *Id.*, s. 127(3).

⁹⁵ *Id.*, s. 127(2).

in negotiation is to be made public, either in connection with recommended terms of settlement or otherwise.⁹⁶

The effectiveness of mediation under the Code will ultimately depend upon the calibre of mediators recruited and deployed by the minister. Certainly, the prospects of success can only appear brighter than they were under the ill-starred, grandiose Mediation Commission Act.⁹⁷

Finally, to assure that mediators (and others concerned with the administration of labour relations policies) operate against a background of accurate information, a broad mandate is conferred on the minister to

inquire into any matter relating to the relationships between employers and employees, the maintenance of industrial peace, and the settlement of disputes, including . . . matters relating to economic growth, labour-management relations, productivity, problems of adjustment, industrial research, technological research, and any other matter that will assist in the accumulation and dissemination of industrial and labour information.⁹⁸

Neither information nor sweet reason are likely to induce labour lambs to lie down with management lions (or vice versa), or to assure that every attempt at collective bargaining produces a mutually acceptable agreement. But information can dispel unnecessary conflicts over facts, and can provide both the parties and government with a basis for long-range planning and institutional change. Information, research and reflection, too, may temper unrealistic public expectations about the imminent advent of the millenium.

E. Protection of the Public Interest

British Columbia, like many other Canadian jurisdictions, relies upon the appointment of an *ad hoc* Industrial Inquiry Commission as the potential response to labour disputes, existing or apprehended, which have high public visibility.⁹⁹ Perhaps betraying a high degree of optimism, the Code also provides that the parties may agree in advance to accept the Commission's report, and are then bound to

⁹⁶ The Labour Ombudsman, discussed *infra*, at note 232, has power to compel disclosure of information for the purposes of his investigation, the Code, s. 137.

⁹⁷ S.B.C. 1968, c. 26, am. by S.B.C. 1972 (2d), c. 8, repealed by the Code, s. 151(b).

⁹⁸ The Code, s. 123(1).

⁹⁹ *Id.*, s. 122.

do so.¹⁰⁰ However, in the absence of such agreement, the report has, at most, a suasive effect on the parties and on public opinion.

Assuming that some labour disputes will slip through this web of mediative devices, the government has had to confront the difficult issue of how far to permit its support of the collective bargaining process to impinge upon other important public interests. By comparison with the former Mediation Commission Act, where virtually any strike could be terminated and replaced by compulsory arbitration,¹⁰¹ the Code's reach is limited indeed. Even strikes of police, firemen and hospital workers are not forbidden, although provision is made for disputes of these groups to be submitted to arbitration at the union's option.¹⁰²

The absence of any standing prohibitions against strikes obviously does not prevent a government from introducing *ad hoc* legislation specifically designed to deal with individual emergent situations. But *ad hoc* legislation is a dangerous business: it invites politicization of disputes; it changes the rules in the middle of the game — and is thus liable to be challenged on grounds of basic fairness; and it does not afford the parties or the government any long-term basis for resolution of difficult, structural problems.¹⁰³ Moreover, for a government which generally looks to labour for support, reliance upon *ad hoc* legislation may simply not be a realistic possibility. This point was seized upon by an opposition spokesman who pointed out that during a ferry strike prior to the introduction of the Code, the government had conceded that it had a gun at its head, that it could do nothing.¹⁰⁴ The new Code leaves the government's position unchanged.

F. Administration of the Collective Agreement

As in other matters, the Code begins with arrangements familiar to any student of Canadian labour law: collective bargaining is intended to produce written agreements of at least one year's duration;¹⁰⁵ during the term of an agreement, the parties are required

¹⁰⁰ *Id.*, s. 122(8).

¹⁰¹ *Supra*, note 97, ss. 18(1), 21(2).

¹⁰² The Code, s. 73. The issue of public service strikes was hotly debated. See DEBATES, *supra*, note 1, at 999-1019. The government's position was that although it hoped that most unions would opt for arbitration, the *right* to strike was crucial.

¹⁰³ ARTHURS, LABOUR DISPUTES IN ESSENTIAL INDUSTRIES 228-32 (Task Force on Labour Relations Study No. 8, 1968).

¹⁰⁴ P. L. McGeer (Lib., Vancouver-Point Grey), DEBATES, *supra*, note 1, at 503.

¹⁰⁵ The Code, ss. 1(1), 65(2) and 66.

to submit disputes regarding its interpretation or breach to arbitration;¹⁰⁶ and they are forbidden to use economic force so long as the agreement remains in effect.¹⁰⁷ Like the predecessor Labour Relations Act,¹⁰⁸ the Code provides for third party intervention, on request, as a supplement, or an alternative, to arbitration.¹⁰⁹ Like other provincial statutes, the Code provides for ministerial intervention where the establishment of an arbitration board is frustrated by the failure of the parties to appoint their nominees, or to agree upon a chairman.¹¹⁰ And, as did its predecessor,¹¹¹ the Code requires that every collective agreement contain provisions relating to the discipline or discharge of employees,¹¹² linking this to a long-standing procedural section authorizing arbitrators to modify disciplinary penalties which do not meet a "just and reasonable" standard.¹¹³ These sections make universal and statutory common consensual provisions which had evolved over the years in the arena of collective bargaining.

But there are important innovations as well. A substantive matter of potential significance is the treatment of technological change. Provision for the arbitration of disputes arising out of adjustment to change must be made in every collective agreement, failing which the omission may be remedied by ministerial order.¹¹⁴ When changes are made or contemplated which affect the job security or working conditions of employees, or the basis upon which the agreement was negotiated, the matter is to be submitted to arbitration. The arbitrator may make a variety of orders including reinstatement and compensation of displaced employees, delay of the change for up to ninety days, and ultimately, referral to the Labour Relations Board.¹¹⁵ The board, in turn, may require the parties to renegotiate

¹⁰⁶ *Id.*, ss. 93, 94.

¹⁰⁷ *Id.*, s. 79.

¹⁰⁸ R.S.B.C. 1960, c. 205, s. 22(4).

¹⁰⁹ The Code, s. 96. In lieu of arbitration, the board may either order the matter to be resolved by an officer, through settlement discussions with the parties, or to be decided by its own final and conclusive order.

¹¹⁰ *Id.*, s. 95. Cf. Ontario Labour Relations Act, *supra*, note 3, s. 37(4); Manitoba Labour Relations Act, *id.*, s. 84(6); see also Saskatchewan Labour Relations Act, *id.*, s. 26(7), where the Chairman of the board has similar powers.

¹¹¹ Labour Relations Act, *supra*, note 108, s. 22(1)(a), as amended by S.B.C. 1963, c. 20, s. 3.

¹¹² The Code, s. 93(1)(a).

¹¹³ *Id.*, s. 98, formerly Labour Relations Act, *supra*, note 108, s. 22(5), as amended by S.B.C. 1963, c. 20, s. 3.

¹¹⁴ *Id.*, ss. 74, 75.

¹¹⁵ *Id.*, s. 76(2).

their collective agreement, with the possible threat of a strike as a spur to negotiations.¹¹⁶ But while these provisions are far-reaching, they do not exceed those of other Canadian jurisdictions.¹¹⁷ If not "the dullest bill" in relation to technological change, neither is the Code the most exciting.

As mentioned, the Code continues earlier provisions for third party intervention in grievance handling. However, it enlarges the opportunity for such intervention in at least three ways. First, "[w]here . . . delay . . . has occurred in settling [a] difference," the board may expedite arbitration proceedings where the difference is arbitrable.¹¹⁸ A similar power is vested in the minister when an arbitrator has failed to issue a decision within a reasonable time.¹¹⁹ Second, whether the matter is arbitrable or not, the board may request the minister to appoint a special officer,¹²⁰ a step he may undertake of his own volition "in the interest of industrial peace"

[w]here there is a dispute, or difference arising out of, or relating to a collective agreement, or a likelihood of such dispute or difference, during the term of a collective agreement. . . .¹²¹

The special officer has plenary power to investigate and decide the dispute, or to remit it to the grievance machinery at any stage up to, and including, arbitration.¹²² However, if the "special officer makes an order on a matter not provided by the collective agreement, or [which] differs from [its] provisions" his order binds for only thirty days.¹²³ Third, the parties are offered a subsidy (amounting to one-third of the cost) if they write into their collective agreement a provision that a named third party will speedily investigate and define differences and make written recommendations to resolve them.¹²⁴

These measures should help to unclog the grievance machinery, and allow all claims to flow through legal channels rather than find

¹¹⁶ *Id.*, s. 77.

¹¹⁷ See, e.g., Canada Labour Code, *supra*, note 4, ss. 149 *et seq.*; Manitoba Labour Relations Act, *supra*, note 3, ss. 72-5; Saskatchewan Trade Union Act, *id.*, s. 42; Technological Change Rationalization Act, S.S. 1972, c. 133.

¹¹⁸ The Code, s. 97.

¹¹⁹ *Id.*, s. 100.

¹²⁰ *Id.*, s. 97.

¹²¹ *Id.*, s. 113.

¹²² *Id.*, s. 114.

¹²³ *Id.*, s. 116.

¹²⁴ *Id.*, s. 112.

illegal expression during the lifetime of the agreement or to burst forth upon its expiry.¹²⁵ But they may turn out to be mere half-measures. The special officer's mandate is to investigate disputes "arising out of, or relating to a collective agreement."^{125a} How, then, may he make an order "on a matter not provided by the collective agreement or . . . [which] differs from [its] provisions"?^{125b} And is he to be expected to indicate that his order is of that type, hence limited in effectiveness to a thirty day period? And in any event, will not all orders be subject to challenge as being, essentially, non-arbitrable or as not "arising out of, or relating to" an agreement? Finally, it should be noted that the special officer is not shielded by a privative clause, as is the Labour Relations Board,¹²⁶ but is subject to appellate court review, as are arbitration boards.¹²⁷ Accordingly, the prospect is for delays, legalism, fine interpretations, court challenge, and ultimately paralysis—the very syndrome afflicting the arbitration system and requiring the creation of the "special officer" device.

Turning, then, to the risks of legalism,¹²⁸ the Code makes a very modest effort to mitigate the worst effects of court review. What it does not do is to oust review altogether; rather the approach is to regularize it and to define its limits.

In general terms, the Arbitration Act¹²⁹ is made applicable to labour arbitration, with certain modifications.¹³⁰ A stated case procedure is put in place,¹³¹ presumably to expedite the decision of legal questions. However, this procedure suffers from at least three defects:

¹²⁵ This was clearly the hope of the government:

[O]ne of the greatest and most sensitive problem areas has been disputes arising during the course of collective agreements. It's manifested through job actions, work-to-rule programmes, work stoppages, wildcat strikes, and so on. . . . [Section 97] allows the board to become involved at an earlier stage and to offer aids that will pre-empt the necessity for taking this kind of guerilla action and inflaming the whole industrial climate of the province. . . .

Hon. W. S. King, *DEBATES, supra*, note 1, at 398.

^{125a} The Code, s. 113.

^{125b} *Id.*, s. 116.

¹²⁶ See, *infra*, Part III B, *The Board's Powers and the Prospects for Judicial Review*.

¹²⁷ The Code, ss. 107-09 and 121A.

¹²⁸ See generally Weiler, *The "Slippery Slope" of Judicial Intervention* (1971) 9 OSOODE HALL L.J.1; Adams, *Grievance Arbitration and Judicial Review in North America, id.*, 443.

¹²⁹ The Code, s. 106.

¹³⁰ *Id.*

¹³¹ *Id.*, s. 107.

it affords an opportunity for delay; it invites the interpretation of contractual language divorced from the factual environment of the case; and it permits the courts to mould arbitral jurisprudence by *in terrorem* rulings.

So far as review *per se* is concerned, the Code does little to reassure those concerned with establishing or preserving the integrity of the arbitration process. The Court of Appeal, it is true, is given "exclusive jurisdiction in all arbitration cases"¹³² and to this extent some degree of predictability and consistency in the law of judicial review can be expected to emerge. But the substantive grounds for review are virtually open-ended: misbehaviour of the arbitrator, error of law affecting jurisdiction, and denial of natural justice.¹³³

"Misbehaviour", when juxtaposed with the reference to natural justice, can only refer to some technical error such as the reception of inadmissible evidence. No protection is likely to be afforded the arbitrator in such a case by his statutory mandate "to receive and accept such evidence . . . as in [his] discretion [he] considers proper, whether or not the evidence is admissible in a court of law."¹³⁴ The prognosis must be for repeated appeals to the court against relatively minor arbitral departures from familiar procedural and evidentiary rules in the direction of greater informality and flexibility. There is, of course, no desire to license such departures where fundamental violations of natural justice occur, but the experience to date is that such violations have been relatively rare.¹³⁵

The notion that limiting review to "error of law affecting jurisdiction" inhibits a full exploration of all legal issues, can only be described as naive. The ease with which virtually any issue can be translated into a jurisdictional issue has been the subject of rueful

¹³² *Id.*, s. 108, subject to ss. 96 and 107, which provide, respectively, for enforcement of awards and for the decision of stated cases, upon reference by the board, by the Supreme Court.

¹³³ *Id.*, s. 108(1)(a)-(c).

¹³⁴ *Id.*, s. 101(a). See *R. v. Barber, Ex parte Warehousemen and Miscellaneous Drivers' Union, Local 419* (1967) 64 D.L.R. (2d) 387 (ONT. H.C.), *aff'd.* (1968) 68 D.L.R. (2d) 682 (ONT. C.A.).

¹³⁵ But see, e.g., *Reference Re Building Material, Construction & Fuel Truck Drivers Union, Local 213, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers and United Cartage Co. Ltd.* (1956) 4 D.L.R. (2d) 98 (B.C.S.C.); *Westeel Products Ltd. v. U.S.W.A.* (1964) 65 C.L.L.C., para. 14,044 (B.C.S.C.); *Re Bradley and Ottawa Professional Fire Fighters Assoc.* [1967] 2 O.R. 311 (C.A.); *Re Hoogendoorn and Greening Metal Products & Screenings Equip. Co. et al.* (1968) 65 D.L.R. (2d) 641 (S.C.C.); *R. v. Fine et al., Ex parte Sheraton Ltd.* [1968] 2 O.R. 490 (ONT. H.C.); *R. v. Board of Arbitration, Ex parte Cumberland Railway Co.* (1968) 67 D.L.R. (2d) 135 (N.S.C.A.); *R. v. Moore, Ex parte Brooks* (1969) 6 D.L.R. (3d) 465 (ONT. H.C.).

observation for at least twenty years.¹³⁶ And the draughtsmen of the Labour Code recognize this: *vide* their elaborate efforts to protect the Labour Relations Board itself from review, even on jurisdictional grounds.¹³⁷

Why, then, are arbitrators afforded so little shelter from the stormy blasts of judicial review? A variety of possible answers may be suggested. Unlike the Labour Relations Board, whose membership is carefully selected and almost certain to be of high quality, the ranks of arbitrators are open to anyone agreeable to the parties. Hence arbitrators are more likely to be variable in skill and experience, to say nothing of legal knowledge. The parties themselves are involved more frequently and more closely with arbitration than with labour relations board proceedings, the public visibility of arbitral awards is lower, and the adverse effects of either awards or judicial decisions can always be undone at the next set of negotiations. For all these reasons, it might be argued that there is little at stake here for a government that seems otherwise committed to the notion of excluding judicial review. But the result of the legislation may well be that review of arbitral awards is the major remaining judicial role in labour relations matters. And review, whatever else it means, means cost, delay and legalism, none of which will make arbitration a more useful instrument in resolving labour-management differences.

So far as protection against "denial of natural justice" is restricted to genuine cases of abuse, there is no possible objection to judicial review. The difficulty is to identify such abuse in the peculiar context of labour relations. Two important illustrations have emerged in recent years: the degree of impartiality required of the parties' nominees to tripartite arbitration boards,¹³⁸ and the right of individual employees to intervene in arbitration proceedings if they are

¹³⁶ Laskin, *Certiorari to Labour Boards: The Apparent Futility of Private Clauses* (1952) CAN. B. REV. 986; Weiler, *supra*, note 128; Hogg, *The Supreme Court of Canada and Administrative Law* (1973) 11 OSGOODE HALL L.J. 187. And see *Port Arthur Shipbuilding Co. v. Arthurs et al.* (1968) 70 D.L.R. (2d) 693 (S.C.C.); *Bell Canada v. Office and Professional Employees' International Union, Local 131* (1973) 37 D.L.R. (3d) 561 (S.C.C.).

¹³⁷ The Code, *supra*, note 2, ss. 31, 33, 34; see *infra*, Part III B, *The Board's Powers and the Prospects for Judicial Review*.

¹³⁸ See Arthurs, *The Three Faces of Justice: Bias in the Tripartite Tribunal* (1963) 28 SASK. L. REV. 147; *Canadian Airline Pilots' Association v. Canadian Pacific Airlines et al.* (1966) 57 D.L.R. (2d) 417 (B.C.C.A.); *Re Carnation Foods Co. Ltd. & Canadian Food and Allied Workers, Local 798 et al.* (1972) 28 D.L.R. (3d) 584 (MAN. C.A.); *Re Canadian Shipbuilding & Engineering Ltd. and United Steelworkers of America* [1973] 3 O.R. 240 (Div. Ct.), *lv. to app. denied* [1974] 1 O.R. (2d) 441 (C.A.).

adverse in interest to the union.¹³⁹ The Code deals with neither problem.

However, the Code does not entirely abandon arbitration to the status quo. Indeed, by several constructive measures, it may well do a great deal to enhance the quality and usefulness of the process. The minister is given a mandate¹⁴⁰ to make administrative arrangements for the conduct of arbitrations, to train and educate arbitrators, to conduct research and publish information about arbitration, and to maintain a register of arbitrators, all of which will presumably enhance the numbers and quality of available arbitrators, and make them more accessible to the parties.

Finally, as has been noted,¹⁴¹ the Code retains provisions of the former statute¹⁴² by which the labour board is empowered to decide disputes which would otherwise be arbitrated. These provisions have been used rather frequently, especially in smaller bargaining units, and the possibility exists of transferring the whole burden of adjudication from arbitrators to the board itself. The board may well cooperate in such a development, if the parties wish it. But some major unions and employers still seem to prefer the control they have traditionally exercised over the machinery of arbitration, to the obvious financial advantages of labour board adjudication.

G. *The Rules of Economic Conflict*¹⁴³

In its articulation of the rules of economic conflict, the Code shows the unmistakable influence of two rather unlikely progenitors — the British Columbia Trade-unions Act of 1959,¹⁴⁴ and the Rand Report of 1968.¹⁴⁵

The Trade-unions Act — denounced and reviled by the labour movement and the C.C.F./N.D.P. opposition through the 1960's, and repealed by the N.D.P. government in 1973 — was nonetheless the first significant Canadian statute to define the limits of lawful

¹³⁹ *Re Hoogendoorn*, *supra*, note 135. See also, Ferguson, *Comment* (1968) 6 OSGOODE HALL L.J. 113; Rossman, *Comment* (1968) 26 U.T. FACULTY L. REV. 1; Paliare, *Tilting Against the Windmill: The Individual's Right to Arbitration* (1970) 8 OSGOODE HALL L.J. 485.

¹⁴⁰ The Code, s. 111.

¹⁴¹ *Supra*, note 109.

¹⁴² *Supra*, note 108.

¹⁴³ Part V of the Code (ss. 79-91) dealing with economic conflict, has not been proclaimed in force as of the date of writing (June 1974).

¹⁴⁴ S.B.C. 1959, c. 90, latterly R.S.B.C. 1960, c. 384, repealed by the Code, s. 151.

¹⁴⁵ *Supra*, note 5.

strikes and picketing. Its basic approach of permitting peaceful picketing only at an employer's business premises and during a lawful strike remains at the core of the new statute.¹⁴⁶ However, the Code does make explicit a number of exceptions to this rather draconian approach which over the years were either accepted by the courts, or advocated unsuccessfully by litigants, academic critics or other legislative reformers.

The Rand Report was greeted with roughly the same enthusiasm by labour unions and N.D.P. supporters as was the Trade-unions Act. Two pro-labour, pro-N.D.P. commentators were particularly scathing in their denunciation of Justice Rand's attempt to "scrap" the system of free collective bargaining and replace it with "the arbitrary fiats of an all-powerful tribunal,"¹⁴⁷ and of his proposal for "a massive derogation of common law with an administrative supervision of labour relations. . . ."¹⁴⁸ Yet, in broad terms, this is the direction in which the new Code turns. The Rand Report recommended that almost limitless power be given to an Industrial Tribunal to tailor the general rules of economic conflict to the particular power-balance of individual strikes.¹⁴⁹ The Labour Code, in rather more limited fashion, gives analogous powers to the Labour Relations Board.¹⁵⁰ And if a difference in degree amounts to a difference in kind, the fact remains that the Rand Report was the first to adopt this approach to regulating economic conflict.

As noted, the Code relies upon the Labour Relations Board and legislatively established rules of conflict rather than upon the courts and judge-made, common law rules. This general approach is amply supported not simply by the precedent of the Trade-unions Act, but as well by academic criticism of the tort doctrines,¹⁵¹ and by the findings of the federal Task Force,¹⁵² to say nothing of the Rand Report.¹⁵³ In the legislative debates on the Code, not one member

¹⁴⁶ Trade-unions Act, *supra*, note 144, s. 3; the Code, ss. 1(1), 85.

¹⁴⁷ Fisher and Crowe, *The Unreal Rand* (September 19, 1968) *Toronto Telegram*.

¹⁴⁸ Fisher and Crowe, *Rand's Monolith* (September 20, 1968) *Toronto Telegram*.

¹⁴⁹ *Supra*, note 5, Recommendations 1, 4, 11-25, 36, 48, and 52.

¹⁵⁰ The Code, ss. 28, 29, 77, 85(1)(b), 86, and 91.

¹⁵¹ Arthurs, *Tort Liability for Strikes in Canada: Some Problems of Judicial Workmanship* (1960) 38 CAN. B. REV. 346; Christie, *THE LIABILITY OF STRIKERS IN THE LAW OF TORT* (1967); Cartothers, *COLLECTIVE BARGAINING LAW IN CANADA* (1965) ch. 26, *The Substantive Law of Picketing and Boycotting*.

¹⁵² *Supra*, note 6, at 130-33.

¹⁵³ *Supra*, note 5, at 64-5 and Recommendation 38, at 96.

of any party sought to preserve, or even clarify, the role of the courts as primary agencies in regulating strikes and picketing.¹⁵⁴

Unlike the Trade-unions Act, which merely established new statutory causes of action to be pursued in the courts, and did not abolish common law proceedings,¹⁵⁵ the Labour Code provides specifically that the board

... has and shall exercise exclusive jurisdiction ... in respect of ...

(b) any application for the restraint or prohibition of any person or group of persons from

- (i) ceasing, or refusing, to perform work, or to remain in a relationship of employment; or
- (ii) picketing, striking, or locking out; or
- (iii) communicating information or opinion in a labour dispute by speech, writing, or any other means of communication.¹⁵⁶

To bolster this provision, it is made clear that "no court has or shall exercise any jurisdiction" in respect of any of the prohibitions in the Act against illegal strikes or picketing, or of any of the activities enumerated in the language quoted above, with specific reference ("without restricting the generality of the foregoing") to the issuance of injunctions.¹⁵⁷ To this total prohibition of judicial intervention, a sole specific exception is made: the need to avoid "an immediate and serious danger to life or health",¹⁵⁸ although even then *ex parte* injunctions are specifically prohibited.¹⁵⁹

The constitutionality of these and other provisions will be canvassed in another section of this article. Of immediate concern is their efficacy. Following the precedent of the U.S. Norris-La Guardia Act,¹⁶⁰ the Code for the most part adopts the device of depriving the courts of jurisdiction, rather than that of abolishing causes of action or immunizing parties to industrial disputes from their application, as did the British Trade Disputes Act of 1906¹⁶¹ and, for

¹⁵⁴ The only opposition query on this point related to the right of a landowner to recover damages for actual physical injury to his property by trespassing pickets; G. B. Gardom (Lib., Vancouver-Point Grey), *DEBATES, supra*, note 1, at 1034-036; discussed, *infra*.

¹⁵⁵ See, e.g., *Perini Pacific Ltd. v. International Union of Operating Engineers Local 115 et al.* (1961) 36 W.W.R. 49 (B.C.S.C.).

¹⁵⁶ The Code, s. 31(1).

¹⁵⁷ *Id.*, s. 31(2).

¹⁵⁸ *Id.*, s. 31(3).

¹⁵⁹ *Id.*, s. 32.

¹⁶⁰ 29 U.S.C. § 104 (1964).

¹⁶¹ 6 Edw. 7, c. 47 (U.K.).

that matter, the British Columbia Trade Disputes Act of 1902.¹⁶² However, in at least three areas, the latter approach was adopted.

Carrying forward a provision of the 1959 Trade-unions Act,¹⁶³ the new Code provides:

Any act done by two or more persons acting by agreement or combination, if done in contemplation or furtherance of a labour dispute, is not actionable, unless the act would be wrongful without any agreement or combination.¹⁶⁴

But the term "labour dispute" was not broadly defined in the 1959 Trade-unions Act,¹⁶⁵ and there is a similarly narrow definition of the term "dispute",¹⁶⁶ simpliciter, in the Code, which appears to envisage a proximate employer-employee relationship. Thus, acts done by third parties which amount to civil conspiracies, and are not those in respect of which a court is specifically deprived of jurisdiction,¹⁶⁷ might still be the subject of a civil action. For example, two trade unionists may conspire to procure a boycott of a non-union employer by means other than "ceasing, or refusing, to perform work, . . . picketing, striking, . . . or communicating information or opinion in a labour dispute. . . ." Keeping in mind the possibly limited definition of the latter phrase, they might well find themselves liable for damages in a common law conspiracy action. Whether boycotts should be totally protected, or protected only in limited circumstances, or protected at all, is a matter for legitimate debate. But the statute might be clearer than it is about who is to make that decision.¹⁶⁸

Other language in the Code poses similar difficulties:

No action lies in respect of picketing permitted under this Act for

- (a) trespass to real property to which a member of the public ordinarily has access; or
- (b) interference with contractual relations.¹⁶⁹

There is relatively little risk that the courts will become involved in

¹⁶² S.B.C. 1902, c. 66. See Carrothers, *The British Columbia Trade-Unions Act, 1959* (1960) 38 CAN. B. REV. 295.

¹⁶³ *Supra*, note 144, s. 5.

¹⁶⁴ The Code, s. 89.

¹⁶⁵ *Supra*, note 144, s. 2.

¹⁶⁶ The Code, s. 1(1).

¹⁶⁷ See, *supra*, notes 157-59.

¹⁶⁸ The permissible limits of "information" which may be disseminated by a union are set out in the Code, s. 84, and discussed *infra*.

¹⁶⁹ *Id.*, s. 87.

defining what is "picketing permitted under this Act," despite an implicit assumption that actions may be brought in respect of non-permitted picketing. The language quoted earlier does appear to consign that task entirely to the Labour Relations Board. However, there still remains the problem of torts committed in the course of permitted picketing. How are these to be dealt with by the courts?

An exchange between the Minister of Labour and a leading opposition critic is illuminating in this regard. Responding to an opposition amendment designed to make pickets liable "for all special damages occasioned and proven," *i.e.* for actual physical damage such as "broken windows or torn fences or ripped partitions,"¹⁷⁰ the Minister stated:

... I have no argument with ... the intent [of the amendment] here, but I do submit that the section does not insulate any person from acts of violence or acts of negligence. ... [T]hat damage would be based either upon negligence or criminal intent or something of that nature, and there is nothing in this Act which seeks to prohibit actions in the civil or criminal courts for such situations.

If [the member] can indicate to me any section of this act which withdraws a citizen's recourse to the courts for that type of situation, then I certainly would be receptive to the amendment. But I submit that that is not the case, Mr. Chairman.¹⁷¹

Assuming that the Minister accurately reflects the intention of the government, it should be noted that the logic of his position is that any tort committed in the course of picketing — defamation, assault, even intimidation (in the sense of a threat to break a contract)¹⁷² — may be actionable unless (presumably) it is specifically precluded by the Code.¹⁷³ At least in the case of the first two torts mentioned, the Minister's position is consistent with the recommendation of the federal Task Force that the "how" of picketing alone remain subject to common law doctrine and judicial control.¹⁷⁴ But there are two difficulties with the Minister's position, one practical, the other interpretative.

The practical difficulty is that in the course of deciding, for example, that messages disseminated by the pickets are defamatory, or that their behaviour constitutes an assault, the court is really

¹⁷⁰ G. B. Gardom, *supra*, note 154, at 1035.

¹⁷¹ *Id.*, at 1035-036.

¹⁷² *Cf.*, *Rookes v. Barnard* [1964] A.C. 1129 (H.L.).

¹⁷³ The Code deals specifically with trespass (s. 87(a)), interference with contractual relations (s. 87(b)), and civil conspiracy (s. 89).

¹⁷⁴ *Supra*, note 6, Recommendation 622, at 180.

determining the efficacy of the picketing. "Defamation" may consist merely in a failure adequately to disclose that the primary locus of the dispute is at another of the employer's business premises.¹⁷⁵ "Assault" may consist merely in "pointing, grimacing and staring."¹⁷⁶ And in determining that the tort of coercion has been committed, the court may well be defining the legitimate ambit of pressure available to a union seeking to enforce its collective agreement.¹⁷⁷ By the astute selection of a cause of action (if the Minister is right) the employer may bypass the whole integrated body of statutory rules administered by the Labour Relations Board.

The more important difficulty with the Minister's view is that it does not appear consistent with a fair interpretation of section 31, quoted earlier, which gives the board "exclusive jurisdiction in respect of . . . picketing, striking . . .," and denies the court "any jurisdiction in respect of a matter" consigned to the board. It would be difficult to resist the conclusion that these words were intended to give the board plenary power to regulate picketing, except that it has no mandate in regard to the "how" of such activity.

The escape from this latter difficulty, if any, lies only in the direction of defining picketing. The Code is of some assistance in this exercise:

"[P]icket" or "picketing" means watching and besetting, or attending at or near an employer's place of business, operations, or employment for the purpose of persuading or attempting to persuade anyone not to

(i) enter that employer's place of business, operations, or employment;
or

(ii) deal in or handle the products of that employer; or

(iii) do business with that employer,

and any similar act at such place that has an equivalent purpose.¹⁷⁸

This definition does not expressly embrace the use of violence, defamation, or economic threats and such activities are therefore presumably not "picketing". But if they are not, the first practical problem must again be considered: the courts may be left with a

¹⁷⁵ *F. W. Woolworth Co. Ltd. v. Retail Food and Drug Clerks Union, Local 1518* (1962) 30 D.L.R. (2d) 377 (B.C.S.C.).

¹⁷⁶ *Hammer v. Kemmis* (1956) 18 W.W.R. 673 (B.C.S.C.) at 677, *aff'd.* (1956) 20 W.W.R. 619 (B.C.C.A.).

¹⁷⁷ *Supra*, note 172. The counterpart Canadian case, *International Brotherhood of Teamsters, Local 213 v. Therien* [1960] S.C.R. 265, was framed in terms of "wrongful interference with the plaintiff's business", a tort only arguably preempted by the Code's prohibition of action "for interference with contractual relations": the Code, s. 87(b).

¹⁷⁸ The Code, s. 1(1).

major role in defining the permissible limits of economic conflict.

Keeping in mind, then, that the common law may be alive and well, notwithstanding the apparent contrary intention of the draughtsmen, what are the ground rules of industrial conflict as the statute envisages them?

As noted, the basic rules for picketing are that it must be persuasive, in support of a lawful strike, and at the employer's place of business.¹⁷⁹

That picketing must be intended to persuade is clear from the statutory definition already quoted. That some degree of physical activity is contemplated also seems clear from the juxtaposition of "watching and besetting" — implying movement, with "attending" — implying a more passive presence. The definition includes "any similar act . . . that has an equivalent purpose," but the scope of this phrase can only be understood when it is contrasted with a general right of communication guaranteed by the Code:

A trade union . . . may, at any time and in any manner *that does not constitute picketing as the word is defined in this Act*, communicate information to any person, or publicly express sympathy or support for any person, as to matters or things affecting . . . terms or conditions of employment or work done or to be done by that person.¹⁸⁰

This distinction between communication and picketing is further evidence of an expectation that pickets will do something more than merely inform. The question is how much more they will be permitted to do. At a minimum, they will attend and persuade; at a maximum, they will watch, beset and do similar acts in order to persuade. But it will still be necessary to decide whether particular conduct should be characterized as persuasion, or as something so much more than persuasion that it is different from persuasion, and hence not "picketing." For example, mass picketing, raucous heckling, brief or extended blockage of pedestrian or vehicular traffic are not unknown. All are no doubt intended to persuade. But will the Labour Relations Board (or the court exercising a vestigial jurisdiction in tort) begin to hold that such conduct is illegal "non-picketing" because of its superadded nonpersuasive features? And, if so, where will the lines be drawn? Must persuasion be "rational?"¹⁸¹ Must it be undertaken through polite, verbal appeals

¹⁷⁹ *Id.*, ss. 1, 85.

¹⁸⁰ *Id.*, s. 84 [emphasis added].

¹⁸¹ *Williams v. Aristocratic Restaurants (1947) Ltd.* [1951] S.C.R. 762, *per* Rand J., at 784.

rather than through the dramatic demonstration of solidarity by the appearance of strikers in large numbers? And if actual violence clearly lies beyond the pale, how will it be suppressed while preserving residual persuasive elements? These are difficult issues, and their solution will be one of the most controversial aspects of the operation of the Code.

However, it does seem clear that the right of communication already quoted, and other provisions relating to the permissible situs of picketing, discussed below, may well spell the end of judicial stigmatization of picketing which is "excessive" because it is secondary.¹⁸²

The lawfulness of a strike continues to be an essential precondition of the lawfulness of picketing.¹⁸³ Strikes, in turn, are legal only after the parties have pursued their negotiations to an impasse, and either a secret-ballot strike vote has been conducted or the employer has announced he is going to lock out his employees.¹⁸⁴ During the relatively short period provided for mediation,¹⁸⁵ the right to strike is postponed. All of these provisions essentially conform to the prevailing pattern of Canadian labour legislation, including the former British Columbia statute.¹⁸⁶ Only in relation to the right of public communication by means other than picketing does the Code depart from former provincial policy and even here it is anticipated by legislation in other provinces,¹⁸⁷ as well as by libertarian judicial pronouncements.¹⁸⁸

In relation to the ambit of lawful picketing, however, the Code is considerably clearer than previous legislation, and somewhat more

¹⁸² Arthurs, *Comment* (1963) 41 CAN. B. REV. 573; Carrothers, *Secondary Picketing* (1962) 40 CAN. B. REV. 57; Paterson, *Union Secondary Conduct: A Comparative Study of the American and Ontario Positions* (1973) 8 U.B.C. L. REV. 77; Beatty, *Secondary Boycotts: A Functional Analysis* (1974) 54 CAN. B. REV. 388.

¹⁸³ Cf. Trade-unions Act, 1959, *supra*, note 144, s. 3.

¹⁸⁴ The Code, s. 80.

¹⁸⁵ *Supra*, notes 86-8.

¹⁸⁶ See generally, Arthurs, *The Right to Strike in Ontario and the Common Law Provinces of Canada* (1966) 4 COL. I. DR. COMP. 187.

¹⁸⁷ Court of Queen's Bench Act, R.S.M. 1970, c. C-280, s. 60-2, am. by S.M. 1970, c. 79, s. 2; Industrial Relations Act, S.N.B. 1971, c. 9, s. 105(3); Labour Relations Act, R.S.N. 1970, c. 191, s. 53(3).

¹⁸⁸ *Koss v. Konn* (1961) 30 D.L.R. (2d) 242 (B.C.C.A.), *per* Norris J.A., dissenting; *Channel Seven Television Ltd. v. N.A.B.E.T.* [1971] 5 W.W.R. 328 (MAN. C.A.), *per* Hall J.A.; *Peerless Laundry and Cleaners Ltd. v. Laundry and Dry Cleaning Workers Union* [1952] 4 D.L.R. 475 (MAN. Q.B.); *General Dry Batteries of Canada Ltd. v. Brigenshaw* [1951] O.R. 522 (H.C.).

permissive. Avoiding the semantic trap of *Koss v. Konn*,¹⁸⁹ the new Code cannot possibly be read as applying to pickets outside the labour relations arena; its restrictions are directed to "any matter or dispute to which this Act applies."¹⁹⁰ Thus, the activity of consumer organizations, for example, seems to be safe from any constraints imposed by the Code on picketing.¹⁹¹

So far as the situs of picketing is concerned, an interpretative gloss on the former Trade-unions Act had already extended the right of a union to picket in locations other than the employer's primary place of business. The courts had held that a union could picket any one of the employer's operations,¹⁹² at least where no new corporate entity was interposed,¹⁹³ even where the employer was present only temporarily (though not transitorily),¹⁹⁴ or in company with other employers.¹⁹⁵ These extended rights of picketing are now more clearly articulated, although they are sensibly qualified by a proviso giving the board power to prohibit such picketing where it might lead to the breach of an existing collective agreement.¹⁹⁶ Less clear under the old statute was the right of a union to picket firms allied with the struck employer, although some case law suggested that such a

¹⁸⁹ *Supra*, note 188.

¹⁹⁰ The Code, s. 88.

¹⁹¹ *Cf.*, *Slade and Stewart Ltd. v. Haynes* (1969) 5 D.L.R. (3d) 736 (B.C.C.A.).

¹⁹² *Taylor, Pearson & Carson (B.C.) Ltd. v. Retail, Wholesale & Department Store Union, Local 535* (1961) 30 D.L.R. (2d) 367 (B.C.S.C.); *Crestbrook Forest Industries Ltd. v. I.W.A.* (1967) 68 C.L.L.C., para. 14,093 (B.C.S.C.); *J. H. McRae Co. Ltd. v. I.B.E.W. Local 213* (1969) 4 D.L.R. (3d) 178 (B.C.S.C.).

¹⁹³ *White Lunch Ltd. v. Nielson* (1962) 63 C.L.L.C., para. 15,453 (B.C.S.C.); *Imperial Oil Ltd. v. O.C.A.W.* (1969) 69 W.W.R. 401 (B.C.S.C.), *appeal dismissed*, (1969) 69 W.W.R. 702 (B.C.C.A.).

¹⁹⁴ See, e.g., *B.C. Radio Cabs Ltd. v. Vancouver and District Taxi-Cab Drivers Union* (1964) 43 D.L.R. (2d) 191 (B.C.S.C.); *U.S. Borax & Chemical Corp. v. Retail Wholesale & Dept. Store Union* (1967) 68 C.L.L.C., para. 14,073 (B.C.S.C.); *MacMillan Bloedel Ltd. v. I.B.P.S.P.M.W., Local 76* (1970) 70 C.L.L.C., para. 14,048 (B.C.S.C.); but *cf.* *Williams v. Amalgamated Meat Cutters et al.* (1963) 40 D.L.R. (2d) 885 (B.C.S.C.); *Gesco Distributing Ltd. v. General Warehousemen and Manufacturing Employees Union, Local 842 et al.* (1969) 71 W.W.R. 449 (B.C.S.C.); *Seaboard Shipping Co. Ltd. v. Canadian Merchant Service Guild et al.* (1970) 14 D.L.R. (3d) 266 (B.C.S.C.).

¹⁹⁵ *Pacific Coast Terminals Co. Ltd. v. I.L.U.* (1960) 21 D.L.R. (2d) 249 (B.C.C.A.); *Gadicke Construction Ltd. v. C.U.P.E.* (1966) 66 C.L.L.C., para. 14,142 (B.C.S.C.); *Greenlees Pile-driving Co. Ltd. v. I.B.E.W.* (1969) 4 D.L.R. (3d) 335 (B.C.S.C.); *Seaboard Advertising Co. Ltd. v. Sheet Metal Workers International Association* (1971) 71 C.L.L.C., para. 14,091 (B.C.S.C.).

¹⁹⁶ The Code, s. 85(1)(b).

right might exist.¹⁹⁷ The new Code makes the right explicit; an "ally" is a fair target for picketing.¹⁹⁸

The Code also makes explicit the right to picket on the public areas of shopping centres and other "property to which a member of the public ordinarily has access,"¹⁹⁹ a conclusion towards which some provincial courts were already groping.²⁰⁰ However, the Code does so by precluding an action for trespass, which would presumably be brought by the owner of the land, while saying nothing about the right of a struck employer-tenant to sue for interference with his easement over sidewalks or parking lots adjacent to his premises within the shopping centre. Moreover, the section would appear to be so broadly drawn as to permit picketing within the public areas of a retail store or office building, at least insofar as the owner is prevented from suing for trespass. There seems little justification for such an extended right of access, since in most cases there will be a suitable location for picketing on adjacent streets, or "quasi-public" areas.

In relation to the right to strike, *per se*, the Code is rather surprising, more because of what it does not provide, than because of what it does. The trend of Canadian legislation has been to ensure some form of security for striking employees which will render them less vulnerable to employer pressure. Virtually all of our labour laws (including that of British Columbia)²⁰¹ purport to preserve the employment relationship during a strike. In *R. v. Canadian Pacific Railway Co.*²⁰² (the *Royal York Hotel* case), however, the employer's attempt to discharge strikers was also held to be an unfair

¹⁹⁷ *Becker Constr. Co. Ltd. v. United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry* (1959) 15 D.L.R. (2d) 354 (B.C.C.A.); *U.S. Borax*, *supra*, note 194. See also *Refrigeration Supplies Co. Ltd. v. Ellis* (1970) 14 D.L.R. (3d) 682 (ONT. H.C.) for a review of the cases.

¹⁹⁸ The Code, s. 85(1)(c). The definition of an "ally" is provided by ss. 85(2) and (3).

¹⁹⁹ *Id.*, s. 87(a).

²⁰⁰ See Arthurs, *Comment* (1965) 43 CAN. B. REV. 357 and cases cited therein; but see *contra R. v. Page* [1963] 1 C.C.C. 293 (ONT. H.C.); *R. v. Peters* (1969) 68 C.L.L.C. para. 14,218 (ONT. PROV. CT.), *rev'd.* (1971) 16 D.L.R. (3d) 143 (ONT. C.A.), *aff'd.* (1971) 17 D.L.R. (3d) 128 (S.C.C.). See also *Harrison v. Carswell* [1974] 4 W.W.R. 394 (MAN. C.A.).

²⁰¹ The Code, s. 1(2). Note that this protection is afforded only to employees who are involved in legal strikes. *Cf.*, Ontario Labour Relations Act, *supra*, note 3, s. 1(2), which contains no such limitation; *Praesto Aluminum Products Ltd.* (1959) 59 C.L.L.C. para. 16,137 (O.L.R.B.).

²⁰² (1961) 31 D.L.R. (2d) 209 (ONT. H.C.), *aff'd.* (1962) 33 D.L.R. (2d) 30 (ONT. C.A.), *aff'd sub nom. Canadian Pacific Railway Co. v. Zambri* (1962) 34 D.L.R. (2d) 654 (S.C.C.).

labour practice because it was aimed at employees who were "exercising . . . rights under the Act"²⁰³ to "participate in [the] lawful activities"²⁰⁴ of a union, specifically, striking.

No such clear statutory basis exists in the new Code for preventing an employer from discharging strikers. Discharge is forbidden only where it is aimed at union membership *per se*,²⁰⁵ rather than at other "lawful activities." Indeed, the only references to such activities reinforce this point. There is a specific prohibition against attempts to restrain the exercise of rights under the Act by the imposition of conditions in a contract of employment.²⁰⁶ This provision obviously cannot apply where employment has been terminated. Second, another provision forbids interference "with lawful concerted action" but only where such action is "for the purpose of obtaining collective representation."²⁰⁷ It would prove of little assistance to employees engaged in a conventional strike for higher wages.

On the other hand, the Code does contemplate that workers who have formed unions will use those unions for collective bargaining purposes, that in aid of collective bargaining such unions may call strikes, and that workers may participate in strikes called by their unions. It can be argued, then, that the statutory prohibition against discharge for union membership²⁰⁸ extends to discharge which has the effect of rendering such membership nugatory by punishing workers who participate in an activity which is a necessary incident of membership. Alternatively, it can be argued that if an employer confronts an employee with the choice of defecting from the strike or forfeiting his employment, he has thereby "impose[d] [a] condition in a contract of employment seeking to restrain an employee from exercising his rights under this Act."²⁰⁹ As in the *Royal York Hotel* case, the right in question is the right "to participate in [the union's] lawful activities."²¹⁰

Even assuming that these latter arguments prevail, at best the new Code virtually replicates the former legislation,²¹¹ and does little to

²⁰³ Ontario Labour Relations Act, *supra*, note 3, s. 58(a).

²⁰⁴ *Id.*, s. 3; *cf.* the Code, s. 2.

²⁰⁵ The Code, s. 3(2)(a).

²⁰⁶ *Id.*, s. 3(2)(b).

²⁰⁷ *Id.*, s. 3(2)(f).

²⁰⁸ *Id.*, s. 3(2)(a).

²⁰⁹ *Id.*, s. 3(2)(b).

²¹⁰ *Id.*, s. 2.

²¹¹ *Supra*, note 108, s. 4(2).

make the position of the striker more secure. This is particularly surprising since recent legislative changes in other Canadian jurisdictions have tended to enhance the position of strikers. For example, recent enactments have prohibited employers from cancelling various employment-related benefits such as pensions,²¹² or have required employers to permit strikers to return to work either absolutely,²¹³ or within a fixed period of time following the commencement of the strike.²¹⁴ The new Code contains no such provisions.

Instead, it makes the relatively innocuous gesture of prohibiting the use of professional strike breakers,²¹⁵ while leaving undisturbed the employer's historic right to hire replacements "off the street."²¹⁶ The gesture, of course, can only fairly be termed "innocuous" in those situations where the employer cannot effectively recruit strike-breakers "off the street" because the workforce is too large to be replaced on the local labour market, because the employees are too highly skilled to be replaced, or because the union's organization of the potential pool of replacements effectively rules out such a possibility. But where a small, weak group of unskilled employees is on strike, the use of professional strikebreakers is a potentially important weapon for the employer, and the prohibition of its use should help to maintain a more nearly equal balance of power between the parties. In so doing, it may help to dampen down the frequently incendiary atmosphere of such strikes, and thus promote generally a more temperate climate of labour relations in the province.

Finally, mention must be made of a provision whose terms are capable (on one possible interpretation) of rather far-reaching consequences:

Except as otherwise agreed in writing . . . where the [strike] vote is in favour of a strike,

- (a) no person shall declare or authorize a strike, and *no employee shall strike, except during the three months immediately following the date on which the vote was taken; . . .*²¹⁷

The italicized language, read in isolation from the balance of the section, might give rise to the inference that strikes must either be

²¹² Manitoba Labour Relations Act, *supra*, note 3, s. 14(1)(a); Canada Labour Code, *supra*, note 4, s. 184(3)(d).

²¹³ Manitoba Labour Relations Act, *supra*, note 3, s. 11.

²¹⁴ Ontario Labour Relations Act, *supra*, note 3, s. 64.

²¹⁵ The Code, s. 3(2)(c). The term "professional strike breaker" is defined in s. 1(1).

²¹⁶ Hon. W. S. King, DEBATES, *supra*, note 1, at 1033.

²¹⁷ The Code, s. 81(2) [emphasis added].

terminated within three months or renewed by the holding of a new vote. However, this reading seems strained for several reasons. First, an important policy decision to limit strikes to a three month period is hardly likely to be buried in a section dealing with strike votes. Second, such a limitation would have to be coupled with some statement as to the consequences of terminating the strike; no such statement is provided. Third, the opening words of the subsection — “no person shall declare or authorize a strike . . .” — envisage that the strike has not yet begun. Consequently, the parallel clause — “no employee shall strike” — should also be read as if the strike has not yet begun; in effect it should be read as “no employee shall *go on* strike.” This interpretation, it is submitted, is more consistent with both the intent and the textual setting than the far-reaching interpretation initially proffered.

H. Individual Rights and Union Power

Irony is the *leitmotif* of the provisions of the Code dealing with the position of individual employees vis-a-vis labour unions. Irony: because unions were originally meant to protect individuals from the power of their employer and now, it is said, they themselves hold individuals powerless in their grip. Irony: because few governments in the country have gone as far as that of British Columbia to protect individuals from potential abuse of the power of unions, yet its efforts to do so evoked more criticism from the opposition than almost any provision of the Code. Irony: because few segments of the Canadian labour movement have been more committed to political action than that of British Columbia, but having helped to elect an N.D.P. government, few find their internal affairs subject to closer public scrutiny.

Quite conventionally, the Code gives a union holding bargaining rights the exclusive authority to bargain collectively for employees in the bargaining unit, and to bind them by a collective agreement.²¹⁸ This right carries with it the possibility that union membership may become a condition of employment, if the employer agrees to incorporate such a provision in the collective agreement.²¹⁹ Both the exclusivity principle and union security clauses derogate from the absolute freedom of individuals to participate in, or support, other

²¹⁸ *Id.*, s. 46(a).

²¹⁹ *Id.*, s. 9. In the absence of such a provision, an employee may nonetheless require an employer to honour a written assignment of his wages to the union for dues, subject to cancellation of such assignment by him or by the labour board, s. 10.

unions or no union, even though the Code appears at first glance to guarantee the freedom to join a union,²²⁰ and to prohibit

... coercion or intimidation of any kind that could reasonably have the effect of compelling or inducing any person to become or refrain from becoming, or to continue or to cease to be, a member of a trade union.²²¹

The issues of whether union security arrangements should be permitted, or to what extent, of whether inter-union disputes should be more closely regulated by law, and of whether the internal affairs of trade unions should be matters for self-government, are all too complex for satisfactory resolution in this note.²²² Suffice it to say that there is widespread acceptance of the notion that union power carries reciprocal responsibilities owed to the individuals on whose behalf it is meant to be exercised. As the Supreme Court of Canada stated:

[A] union has, as a result of certification, ceased to be a purely voluntary association of individuals. It has become a legal entity, with the status of a bargaining agent for a group of employees, all of whom are thereby brought into association with it, whether as members, or as persons whom it can bind by a collective agreement, even though not members. It must, as their agent, deal with the members of the group which it represents equitably.²²³

This notion has begun to be reflected in such statutory admonitions as the new Code contains, requiring unions not to represent employees "in a manner that is arbitrary, discriminatory, or in bad faith," regardless of union membership.²²⁴ In British Columbia, this so-called duty of fair representation may be enforced through conventional administrative remedies available for redress against any unfair labour practice.²²⁵

²²⁰ *Id.*, s. 2.

²²¹ *Id.*, s. 5.

²²² See generally, Palmer, RESPONSIBLE DECISION-MAKING IN DEMOCRATIC UNIONS, (Task Force on Labour Relations Study No. 11, 1969).

²²³ *Imperial Oil v. Oil, Chemical and Atomic Workers* [1963] S.C.R. 584, at 593 *per* Martland, J.

²²⁴ The Code, s. 7(1); *cf.* Ontario Labour Relations Act, *supra*, note 3, s. 60. See generally, Carr, *Development of the Duty of Fair Representation in Ontario* (1968) 6 OSGOODE HALL L.J. 281; Adell, *The Duty of Fair Representation* (1970) 25 IND. RELATIONS 602.

²²⁵ The Code, s. 8. No statutory language appears to deal with the special problems which arise when the union's alleged denial of fair representation relates to its failure to process a grievance for the complainant against the employer. If the union is found to have violated the statutory standard, may the board make an order against the employer, who may have been guilty of no such violation, requiring reinstatement (or other redress) to be undertaken by the employer? The issue is thoroughly ventilated, but not decided, in *Ford Motor Co. v. Gebbie* [1973] O.L.R.B. REP. 519, at 528 *et seq.*

However, given the possibility that the union security provisions permitted by the Code may either forestall the employment of non-unionists, or lead to their discharge, the issue of fair representation may be preempted altogether. This concern takes on special intensity in the case of those who have conscientious scruples against union membership. For such individuals the Code offers significant protection, but it sounds in the realm of conscience, not of cash. They are excused from compliance with union security provisions, but are still required to pay the union a sum equivalent to union dues,²²⁶ presumably on the rationale of the Rand formula²²⁷ that they are the beneficiaries of the union's efforts to secure and enforce the collective agreement. This latter requirement was attacked by opposition spokesmen who unsuccessfully urged that a public purpose should be the beneficiary of such payments by conscientious objectors, if there were a need to neutralize the financial advantage accruing to them because they need not pay union dues.²²⁸ On the other hand, some government supporters appeared uneasy about even this degree of relaxation in the principle of union security. One such member urged that conscientious objectors should be excused from paying anything to the union, but should be denied all benefits negotiated by the union, and paid the minimum wage established by statute.²²⁹

In the result, British Columbia is far more solicitous of conscientious objectors than Ontario, which merely protects those who have vested rights in employment as of the date when the union security regime begins,²³⁰ but rather less so than Manitoba and Saskatchewan, both of which offer complete immunity from either participating in, or paying dues to, the union.²³¹

But the truly significant innovation in British Columbia is the establishment²³² of an independent Labour Ombudsman,²³³ with power

²²⁶ *Id.*, s. 11.

²²⁷ *Ford Motor Co. v. U.A.W.* (1946) 1 C.C.H. LAB. LAW REP. para. 2150 (Hon. I. G. Rand, Arbitrator).

²²⁸ J. R. Chabot (S.C., Columbia River), *DEBATES*, *supra*, note 1, at 828-30, 839-40; D. A. Anderson (Lib., Victoria), *id.*, at 830-32, 844.

²²⁹ C. S. Gabelmann, *supra*, note 75, at 833.

²³⁰ Ontario Labour Relations Act, *supra*, note 3, s. 39(2).

²³¹ Manitoba Labour Relations Act, *supra*, note 3, s. 68(3); Saskatchewan Trade Union Act, *id.*, s. 5(1).

²³² As of the date of writing (June 1974) the statutory provisions relating to the Labour Ombudsman had not yet been proclaimed in force.

²³³ The independence of the Labour Ombudsman is secured by giving him tenure for a five year, renewable term, and by forbidding him to perform duties or functions other than those of his office; the Code, ss. 128, 136.

... to investigate any decision or recommendation made, or act done or omitted, relating to a matter of administration, including the merits of a policy, and affecting any person, ...

by a governmental agency or tribunal acting under the Labour Code or other provincial legislation administered by the Department of Labour, or by a trade union or an employer.²³⁴

The Labour Ombudsman is given sweeping investigative powers,²³⁵ and is mandated to use those powers notwithstanding the existence of privative clauses which might otherwise immunize decisions of such bodies from scrutiny.²³⁶ Where investigation reveals that

- (a) the decision, recommendation, act, or omission affecting any person
 - (i) appears to be contrary to law; or
 - (ii) although lawful is unreasonable, unjust, oppressive, or improperly discriminatory; or
 - (iii) was based on a mistake of fact; or
 - (iv) is contrary to the public conscience; or
- (b) a discretionary power has been exercised
 - (i) for an improper purpose; or
 - (ii) on an irrelevant ground; or
 - (iii) by taking into account an irrelevant consideration; or
 - (iv) without reasons being given for the decision,

the Ombudsman may make a report, including reasons and recommendations, and invite a response from the person or body being investigated.²³⁷ Where his recommendations do not elicit satisfactory action, the report is to be submitted to the Minister of Labour and the provincial Legislature, and may be otherwise publicized by the Ombudsman.²³⁸

Obviously, the Labour Ombudsman is not intended to have general curative jurisdiction in relation to all ills in the world of industry. He has only the legal power of investigation; his reports bear only the moral *imprimatur* of his office; his recommendations have no enforcing sanction save that of publicity. But for all of these apparent limitations, the Ombudsman's effectiveness is potentially formidable. He can cut through jurisdictional boundaries, procedural rules and even substantive legal doctrines in order to arrive at a fair and just resolution of complaints. He can make recom-

²³⁴ The Code, ss. 128, 129. However, s. 137(3) limits the investigation to the decision *per se* rather than to the proceedings or evidence.

²³⁵ *Id.*, ss. 129, 131, 132, 137(1) and (2).

²³⁶ *Id.*, s. 130.

²³⁷ *Id.*, s. 133.

²³⁸ *Id.*, s. 135.

mendations with some assurance that noncompliance will result in great embarrassment for the alleged malefactor. And, most importantly, even where he dismisses a complaint, or where his recommendations are not complied with, the complainant will have had the satisfaction of a full and fair investigation.

What the Code does not do (except by giving the Labour Ombudsman investigative power) is to regulate affirmatively the internal affairs of trade unions. Innocuous provisions of the former Labour Relations Act are carried forward requiring unions to make available copies of their constitutions, collective agreements, and audited financial statements.²³⁹ However, there is no attempt to require unions to adhere to democratic procedures in their internal governance, or to establish mechanisms for ensuring honest union administration as recommended, for example, by the federal Task Force on Labour Relations.²⁴⁰ Whether abuse is rare (as the Task Force suggested), or relatively common, an opposition member who urged in principle the adoption of such legislation²⁴¹ was entitled to some kind of response, rather than being virtually ignored. A study undertaken for the Task Force²⁴² shows that, at the least, the legal position of trade union members is obscure. Whether judicial, administrative, or internal remedies are best suited to the protection of the status of union members is open to legitimate debate, but it is difficult to understand why the respective merits of such procedures were not even canvassed.

The labour movement's role in the socio-political life of the community has been, since its earliest years, a matter of debate both within and beyond the ranks of trade unionists.²⁴³ Amongst the issues which have divided the Canadian labour movement for decades are two which debate on the Code brought squarely into focus — the political role of Canadian unions, and their independence from foreign control. Subsumed in these two issues are a series of fundamental assumptions about the relative efficacy of collective bargaining as against political action, about the protection of indi-

²³⁹ Labour Relations Act, *supra*, note 108, ss. 66, 66A; now the Code, ss. 142, 143.

²⁴⁰ *Supra*, note 6, paras. 485 *et seq.*, and see also the articles cited, *supra*, notes 222, 224.

²⁴¹ L. A. Williams (Lib., West Vancouver-Howe Sound), *DEBATES, supra*, note 1, at 473-74.

²⁴² Palmer, *supra*, note 222.

²⁴³ See, *e.g.*, Abella, *NATIONALISM, COMMUNISM AND CANADIAN LABOUR: THE C.I.O., THE COMMUNIST PARTY AND THE CANADIAN CONGRESS OF LABOUR, 1935-1956* (1973); Horowitz, *CANADIAN LABOUR IN POLITICS* (1968).

vidual dissidents within unions and the principle of majority rule, and about the real or imagined tradeoffs between autonomy and access to the financial and technical resources of international unions. Needless to say, few of these assumptions were carefully articulated by spokesmen on either side.

The political role of labour had been a focus of special interest in British Columbia because of labour's active support of the New Democratic Party (and its predecessor, the C.C.F.), and because of a series of confrontations between labour and the former Social Credit government. In 1961, that government enacted legislation forbidding unions to contribute directly or indirectly to political parties.²⁴⁴ The new Code predictably repealed that prohibition, with only the briefest obituary notice from its former sponsors, now the official opposition.²⁴⁵

But if the new Code freed unions to support the New Democratic Party even more effectively in the future, some labour leaders apparently felt that the government was rather ungrateful for past support. This element of strain between the government and its labour allies, widely reported in the press²⁴⁶ and gleefully exploited by opposition members,²⁴⁷ has been variously explained: Mr. Barrett, the new premier, was not favoured by the union wing of the N.D.P. in his campaign for the party leadership; the new Code was ultimately produced by a government team without formal participation by the labour movement; the selection of members for the new Labour Relations Board did not meet with the approval of the union hierarchy; some substantive provisions of the Code were offensive to labour. No doubt there was some truth in each of the explanations. More likely, however, the explanation for the strain lies in the inevitably neutral role of government as referee in the collective bargaining system. As the Minister of Labour stated:

... In general terms, I suggest that there is some feeling of apprehension, perhaps both in the House and perhaps out there in the trade union movement and, undoubtedly, with some sections of management too. ... The parties seem to be concerned with securing their own position in the balance-of-power situation, and I can understand that; I'm

²⁴⁴ S.B.C. 1961, c. 31, s. 5; latterly Labour Relations Act, *supra*, note 108, s. 9(6)(c).

²⁴⁵ H. W. Schroeder (S.C., Chilliwack), *DEBATES, supra*, note 1, at 463.

²⁴⁶ See, e.g., *B.C. Fed flexes muscles to oppose new labor bill* (Oct. 3, 1973) *Vancouver Sun*; *Union foes of new B.C. labour bill gather in Victoria today* (Oct. 9, 1973) *Globe & Mail*; Dobie, *Depths of discontent* (Oct. 29, 1973) *Vancouver Sun*; Schreiner, *Divorce coming with end of Barrett-labor honeymoon?* (Nov. 3, 1973) *Financial Post*.

not condemning them for it. . . . I think it's fair to say that we have approached this as a government in the spirit of trying to develop a better climate which does not upset the balance of power which exists between labour and management unduly and unfairly.²⁴⁸

Such a philosophy is more reminiscent of Metternich than of Marx. It does not promise partisan rewards, but is inevitable if collective bargaining is to function effectively.

The Code does not speak directly to the issue of international versus national unionism. However, this was a frequent theme of opposition speeches during the legislative debate. Given the bitter warfare over nationalism within British Columbia labour circles,²⁴⁹ it is clear that the government might be embarrassed politically by this issue. Its refusal to adopt the cause of nationalism in the legislation was several times underlined by the opposition: certification procedures were assessed from the perspective of whether they permitted workers to shift from international to national unions;²⁵⁰ union security provisions were similarly evaluated;²⁵¹ requirements that all union funds remain in Canada were advocated;²⁵² and an assurance was sought that at least one member of the labour relations board be "a representative of Canadian unions."²⁵³ All to no avail. The fate of Canadian national unions in British Columbia will be determined by their ability to persuade workers to abandon traditional allegiances to international unions. In this contest as in any other, the incumbent undoubtedly enjoys some advantage. But, here again, the government's inevitable role is that of referee.

III. THE ROLE OF THE LABOUR RELATIONS BOARD AND THE COURTS

In introducing the Code on second reading in the legislature, the Minister of Labour stated:

I think that central to the whole new concept of this new legislation is the role that the new Labour Relations Board will play as the agency

²⁴⁷ See, e.g., D. A. Anderson, *DEBATES, supra*, note 1, at 440-42; J. R. Chabot, *id.*, at 899.

²⁴⁸ Hon. W. S. King, *DEBATES, supra*, note 1, at 517.

²⁴⁹ See, e.g., *International Association of Bridge, Structural, and Ornamental Iron Workers Union, Local No. 97 et al. v. Canadian Ironworkers Union No. 1* (1971) 21 D.L.R. (3d) 469 (S.C.C.).

²⁵⁰ P. L. McGeer, *DEBATES, supra*, note 1, at 977-78.

²⁵¹ *Id.*

²⁵² L. A. Williams, *DEBATES, supra*, note 1, at 474.

²⁵³ D. A. Anderson, *DEBATES, supra*, note 1, at 190.

which will be responsible for administration of industrial relations in the province.²⁵⁴

A fair statement this is, and on its face if not "dull," at least no more than the conventional wisdom dictates. But what a storm of editorial comment, opposition criticism, and potential litigation it portends. For the board can only occupy centre stage if it displaces other distinguished actors, the judges:

The board has the structure and the personnel to understand the dynamics of industrial relations. Therefore, it is essential that the board be given comprehensive jurisdiction over the whole process.

The courts of law can only really catch a glimpse of the overall labour picture. Their interference in the past has been sporadic and fortuitous. The judges lack the intimate knowledge of the very dynamic process of industrial relations and collective bargaining. For these reasons, Part II of the new labour code has removed the courts' jurisdiction over labour disputes. . . . The new law seeks an administrative rather than a judicial solution to labour disputes. . . .²⁵⁵

This section of my note will attempt to describe the institution in which so much confidence is reposed, to plot out its jurisdiction, and to ascertain where the courts may continue to patrol the margins of its concerns.

A. The Structure and Procedures of the Labour Relations Board

The notion that an administrative body should have a central role in labour relations reaches back in Canada at least to the turn of the century,²⁵⁶ and probably beyond. In British Columbia, as the new Code makes explicit, the former Labour Relations Board is merely "continued",²⁵⁷ albeit in somewhat altered form. Thus, there is no sharp departure in principle from earlier legislation. As will be seen, it is in the application of the established principle of administrative adjudication to new areas of controversy that the Code is relatively innovative.

The new board is well, if conventionally, designed to receive and exercise broad powers. Like most Canadian labour relations boards,²⁵⁸ the British Columbia board has a tripartite membership

²⁵⁴ Hon. W. S. King, *DEBATES*, *supra*, note 1, at 396.

²⁵⁵ *Id.*, at 399-400.

²⁵⁶ Conciliation and Labour Act, R.S.C. 1906, c. 96; Industrial Disputes Investigation Act, S.C. 1907, c. 20.

²⁵⁷ The Code, s. 12(1).

²⁵⁸ With the notable exception of the Canada Labour Relations Board; see Canada Labour Code, *supra*, note 4, s. 111(2).

of neutral presiding officers and representative members.²⁵⁹ However, unlike most other boards, it may sit in panels comprising only neutral members.²⁶⁰ This arrangement offers several unique advantages. First, in some cases it may be difficult to establish a tripartite panel whose composition does not give rise to at least a suspicion of bias against one of the parties.²⁶¹ Second, the added flexibility of so staffing the panels may expedite hearings. Third, and most important, the board will be permitted to decide cases free from the constraints of partisanship or "horse-trading" which sometimes characterize the executive sessions of tripartite bodies.

However, it is equally true that all of these problems would fall away if the board were composed entirely of neutral members, as recommended by the federal Task Force,²⁶² and by an unsuccessful opposition amendment.²⁶³ The government offered no explanation for the retention of a tripartite board.

One difficulty confronting any tribunal which sits in panels (including an appellate court) is that of preserving consistency amongst the panels. This difficulty is compounded if there is no higher body which can reconcile conflicting lines of decision as they emerge. Informal consultation between members of different panels is no doubt one expedient often resorted to, but it may infringe the principle that "he who decides must hear,"²⁶⁴ and in any event yields no formal resolution of differences. The new Code neatly solves this problem by providing for the establishment of a panel to which questions of law may be referred, by the board or by other panels, for binding decision.²⁶⁵ Presumably this panel will be staffed entirely by neutrals.

The board possesses useful powers with which to discharge its fact-finding tasks. Like virtually all such bodies, it has power *inter alia* to compel testimony, to accept evidence which may not be

²⁵⁹ The Code, s. 12(2).

²⁶⁰ *Id.*, s. 13(3) (a) and (b).

²⁶¹ See Arthurs, *supra*, note 138, and *R. v. B.C.L.R.B., Ex parte Int'l. Union of Mine, Mill & Smelter Workers* (1964) 45 D.L.R. (2d) 27 (B.C.C.A.); *R. v. Manitoba L.R.B., Ex parte CAE Industries Ltd.* (1969) 6 D.L.R. (3d) 451 (MAN. C.A.); *Re Diamond Construction (1961) Ltd. v. Construction & General Labourers, Local 1079* (1973) 39 D.L.R. (3d) 318 (N.B.C.A.).

²⁶² *Supra*, note 6, para. 735 *et seq.*

²⁶³ G. S. Wallace (Cons., Oak Bay), *DEBATES, supra*, note 1, at 881.

²⁶⁴ Finkelman, *THE ONTARIO LABOUR RELATIONS BOARD AND NATURAL JUSTICE* (1965) 9-11; *Mehr v. Law Society of Upper Canada* [1955] 2 D.L.R. 289 (S.C.C.), *per* Cartwright J., at 295.

²⁶⁵ The Code, s. 16.

admissible in a court of law, to enter and inspect premises and examine records, and to perform certain investigative functions through an authorized agent.²⁶⁶ It is master of its own procedures, subject to the requirement that parties be afforded a full opportunity to be heard.²⁶⁷ An opposition attempt to particularize this requirement by a statutory guarantee of the right to counsel was rejected by the government, but the minister did undertake that this right would be set forth in any rules of procedure issued by the board.²⁶⁸

In relation to the development of its substantive doctrine, however, the board is assisted by several unusual statutory provisions. The establishment of a special panel to make binding interpretations of the Code has already been referred to. A requirement that all decisions be made available in writing for publication²⁶⁹ is an important advance over the former British Columbia practice of unpublished decisions. The board's jurisprudence will now be available for the guidance of parties before it, for public evaluation and criticism, and thus perhaps ultimately for more careful refinement by the board. In light of this advance, it is somewhat difficult to understand an opposition attempt to compel publication of every decision.²⁷⁰

In addition to deciding specific questions of law in the context of particular controversies, the board has several other methods by which it can articulate doctrine and policy. It may issue declaratory opinions upon the complaint of a person injured by "an agreement or combination that substantially affects trade and commerce,"²⁷¹ or on application or on its own motion, in relation to any matter arising under the statute.²⁷² The most promising vehicle for developing doctrine is found in the board's power to "formulate general policies . . . for the guidance of the general public and the board."²⁷³ While the board is not bound by such policies, neither does a rule of *stare decisis* commit it to doctrine developed in the context of litigation.²⁷⁴ However, the board will have awakened public expecta-

²⁶⁶ *Id.*, ss. 18, 19, 20 and 35.

²⁶⁷ *Id.*, s. 21.

²⁶⁸ DEBATES, *supra*, note 1, at 895 *et seq.*, esp. Hon. W. S. King, at 895.

²⁶⁹ The Code, s. 23.

²⁷⁰ DEBATES, *supra*, note 1, at 912 *et seq.*

²⁷¹ The Code, s. 90.

²⁷² *Id.*, s. 38.

²⁷³ *Id.*, s. 27(1).

²⁷⁴ Weatherill, *Res Judicata in an Administrative Tribunal* (1965) 4 WESTERN L. REV. 113.

tions by inviting submissions in the process of formulating the policy, and in publishing it after adoption.²⁷⁵ It will be awkward for the board to abandon such a policy, at least without a prospective announcement of its demise.

B. The Board's Powers and The Prospects for Judicial Review

As both its admirers and its critics contend, the British Columbia board possesses broader powers under the new Code than other Canadian labour tribunals. But, again the difference is in degree not kind, in particulars not principle.

Under the former British Columbia statute, the Labour Relations Board had already acquired broad remedial power in respect of unfair labour practices,²⁷⁶ while the Mediation Commission Act gave the provincial cabinet equally broad power in respect of strikes affecting "the public interest and welfare."²⁷⁷ Thus while the Code undoubtedly extends these powers, it does so under cover of whatever legitimacy precedent confers.

The remedies available to the board to control unfair labour practices and economic warfare have been explored above.²⁷⁸ Affirmatively, the board's power rests on a broad mandate to

... order ... any ... person, to do anything for the purpose of complying with this Act or the regulations, or refrain from doing anything in contravention of this Act or the regulations.²⁷⁹

In a negative sense, its exclusive jurisdiction is defended on three sides by privative clauses,²⁸⁰ and on the fourth by a network of provisions²⁸¹ specifically denying the courts recourse to substantive doctrines or remedies which might permit them to deal at first instance with matters consigned to the board.²⁸²

²⁷⁵ The Code, ss. 27(2) and (3).

²⁷⁶ Labour Relations Act, *supra*, note 108, s. 7(4).

²⁷⁷ S.B.C. 1968, c. 26, s. 18.

²⁷⁸ *Supra*, parts II C, *Protecting the Right to Organize* and II G, *The Rules of Economic Conflict*.

²⁷⁹ The Code, s. 28.

²⁸⁰ *Id.*, ss. 31(1), 33, and 34.

²⁸¹ *Id.*, ss. 31(2), 32, 87, and 89.

²⁸² As has been noted, these latter provisions may not have the effect of entirely excluding the courts. For example, not all tort doctrines have been abolished or made inapplicable in the context of "labour disputes": the meaning of that term itself may be narrowly construed; the courts' right to award damages is not impaired, except in respect of a limited list of causes of action; and even the labour injunction lingers on where there is a serious danger to life or health or where the conduct lies beyond the Code's reach. But these exceptions apart, it is essentially true to say that the primary responsibility for regulating strikes and picketing has been assigned to the board.

The board, then, is to occupy the whole field of regulating labour relations, to the virtual exclusion of the courts. In adopting this institutional scheme the government forfeited a good deal of support from an otherwise essentially sympathetic press: "A labour board beyond the courts," cried one editorial;²⁸³ "Alarming B.C. labour bill," warned another.²⁸⁴ What was the government's motive in seeking to displace the courts? And what arguments were mustered in reply?

Essentially, the government argued,²⁸⁵ the board is better equipped as an institution to do the job than the courts, and should be given full powers to develop comprehensive answers to deep-rooted problems. However, never far from the surface in the presentation of the government's case, was an antipathy towards the courts and a resentment of their perceived historic role as an enemy of labour. Consider, for example, the remarks of one minister:

I've never seen labour, or really seldom seen labour, get a fair shake in the courts because there is an attitude in the courts that isn't conducive to giving working people a fair shake. . . . I mean, I just get the feeling that the kind of people who are appointed judges in this system are the kind of people who are designed to go in there and maintain the status quo. . . .²⁸⁶

Of of another:

We have watched for years and years and years the courts take over this whole procedure. The courts are finite as well Mr. Member. What makes you think that courts are some sort of area where natural justice can be delivered? . . .²⁸⁷

Or of a bitter government member, himself the veteran of much litigation:

²⁸³ *Editorial* (Oct. 3, 1973) *Toronto Star*:

Arbitrary powers are likely to be exercised arbitrarily . . .

— J. C. McRuer, former Chief Justice of Ontario in his 1958 [sic] report on civil rights . . .

. . . [T]he McRuer statement quoted above distills a wise scepticism. An agency which operates free of judicial restraint, and with scant reference to the people's elected representatives, wields arbitrary power, however fair and conscientious its members may try to be.

²⁸⁴ *Editorial* (Oct., 1973) *Toronto Globe and Mail*:

The British Columbia Government appears, so far as labor-management matters are concerned, to have jettisoned the rule of law for the rule of men. . . .

²⁸⁵ Hon. W. S. King, *DEBATES*, *supra*, note 255, at 892.

²⁸⁶ Hon. G. R. Lea, Minister of Highways, *id.*, at 475.

²⁸⁷ Hon. D. G. Cocke, Minister of Health Services and Hospital Insurance, *id.*, at 932.

To me what we've had has been years and years of court battles. There has been a heavy cost and it's created a lot of hard feelings, and it's created a lot of hostility. I think that I personally have enough injunctions to paper this room.

I had my family home taken from me in 1967; I never got it back until 1972. That's the sort of feelings that we've had generated in the labour movement as a result of going to court — always going to court.

As I see it now, the kind of argument that's being made by the opposition is that you could go back to the court for various decisions. To me that means that anyone who has the dough, anyone who has the finances, is going to be appealing and being back in the court, and we won't have really changed anything. . . .²⁸⁸

In equally impassioned language, the opposition members sought to preserve a role for the courts. Interestingly, this role was perceived almost entirely as secondary, involving appeals from the board, rather than as primary, involving the award of damages or injunctions. The tone of the opposition's case is well illustrated by several speeches made in support of a Liberal amendment to give jurisdiction to the Court of Appeal to decide stated cases on questions of law and to set aside board decisions, *inter alia*, for "error of law affecting the jurisdiction of the board [and] denial of natural justice".²⁸⁹

Now, Mr. Chairman, the reason for this amendment is very, very obvious. We had some very weak-hearted and weak-sistered protestations from the Hon. Attorney General (Hon. Mr. MacDonald) that the common law of England, from its inception until 1858, and the common law of Caanda, from then until this day truly applied to this bill. These prerogative writs which have emanated from the 13th century on sprung initially from the *curia regis* or the King's Council; they are royal protections from the abuses of power of governing officials. It would seem, upon a close analysis of the legislation, that these writs have disappeared for all practical purposes, save and except one small illustration which the Hon. Minister brought in by way of amendment.

We have 600 years of precedent with these writs and 600 years of protection applied through thousands, and literally hundreds of thousands of fact situations in all of the Commonwealth countries in the world. These writs have been able to do justice and perform equity and to see that might was not right. We find these historic protections essentially dashed to smithereens in this chamber. . . .²⁹⁰

From another Liberal member:

It's not a question of appealing to the courts on whether or not the board made a correct judgment in accordance with the facts before it.

²⁸⁸ C. Liden (N.D.P., Delta), *id.*, at 933.

²⁸⁹ G. B. Gardom, *id.*, at 1044.

²⁹⁰ *Id.*

We're not asking them to appeal on the grounds that the judges in the court may have a different opinion from the members of the board; it's not that type of appeal at all. It is a very specific appeal, and in my mind it is critical to the continued system of democracy as we know it — the Canadian system of law — that appeal be permitted...²⁹¹

Predictably the Minister of Labour was unmoved by these arguments:

Nor do I think that in these circumstances the important question of industrial relations should be frequently appealed to the courts on various points of law simply to open the door to the question and the adjudication of industrial relations matters in the courts, which has proved not to be the most appropriate agency for dealing with this question...²⁹²

Thus, the debate concluded with the Code's privative clauses intact.

As mentioned, these are three in number. The first two are quite conventional, the third novel, controversial, and arguably unconstitutional. The first of these clauses stipulates that

... the board has exclusive jurisdiction to decide for all purposes of this Act any question, including, without restricting the generality of the foregoing, ... [a list of twenty specific matters]...²⁹³

Save for the list of specific matters, which presumably add precision but not effect, this language is virtually identical to that of the Ontario Labour Relations Act.²⁹⁴ The second privative clause is a commonplace admonition, again identical to the Ontario statute,²⁹⁵ save in one important respect, discussed below:

A decision ... of the board made under this Act in respect of any matter in which jurisdiction is conferred by this Act, *or is determined under section 33 to be conferred by this Act*, is final and conclusive, and is not open to question or review in any court...²⁹⁶

The Ontario statute, however, has been treated rather disdainfully by the Supreme Court of Canada in such recent cases as *Jarvis v. Associated Medical Services Ltd.*²⁹⁷ and *International Union of Operating Engineers, Local 796 v. Metropolitan Life Insurance*

²⁹¹ D. A. Anderson, *id.*, at 1045.

²⁹² Hon. W. S. King, *id.*, at 1047.

²⁹³ The Code, s. 34(1).

²⁹⁴ *Supra*, note 3, s. 95(1).

²⁹⁵ *Id.*, s. 97.

²⁹⁶ The Code, s. 34(2) [emphasis added].

²⁹⁷ (1961) 61 C.L.L.C., para. 16,218 (O.L.R.B.), *cert. granted* (1962) 35 D.L.R. (2d) 375 (ONT. C.A.), *aff'd.* (1964) 44 D.L.R. (2d) 407 (S.C.C.).

*Co.*²⁹⁸ The Court's evident desire to prevent what it seems to regard as administrative overreaching has fueled its inventive instincts. Forms of words have been developed which permit it to circumnavigate privative clauses with relative ease: "the Board cannot, by an erroneous interpretation of . . . the Act confer upon itself a jurisdiction it otherwise would not have,"²⁹⁹ "the Board, by asking itself the wrong question, has stepped outside its jurisdiction."³⁰⁰ These cases, and others, have been subjected to searching criticism by many commentators,³⁰¹ and there is no need to rehearse their analysis here. For present purposes, it is sufficient to say that if rational argument based on the evident and expressed intent of the legislature could have persuaded the Court to a more restrained view of its reviewing function these cases would have been decided differently.

If this estimate of the Supreme Court is at all accurate, and if indeed the Court is bound and determined to penetrate heavy gauge privative boilerplate, will it be turned aside by the efforts of the draughtsmen of the new Code?

It is certainly true that the Code contains a third, ingenious privative clause, referred to in the language quoted earlier — "jurisdiction . . . determined under section 33 to be conferred by this Act, is final and conclusive. . . ." Section 33, the clause in question, seeks to respond directly to the Court's recent penchant for correcting perceived administrative error by labelling it "jurisdictional". The section provides:

The board, in respect of matters [under stipulated sections] has and shall exercise exclusive jurisdiction to determine the extent of its jurisdiction under those sections, or to determine any fact or question of law that is necessary to establish its jurisdiction.

Will section 33 succeed where its predecessors have failed?

At a minimum, section 33 may not respond directly to the formu-

²⁹⁸ (1967) 67 C.L.L.C., para. 16,026 (O.L.R.B.), *cert. granted* (1970) 11 D.L.R. (3d) 336 (S.C.C.).

²⁹⁹ *Supra*, note 297, *per* Cartwright J., at 411.

³⁰⁰ *Supra*, note 298, *per* Cartwright J., at 344.

³⁰¹ See, e.g., Weiler, *supra*, note 128; Hogg, *The Jurisdictional Fact Doctrine in the Supreme Court of Canada* (1971) 9 OSGOODE HALL L.J. 203; Angus, *Judicial Review in Canada: Do We Need It?* (1974) 26 AD. L. REV.; Hogg, *Judicial Review: How Much Do We Need?* (1974) 26 AD. L. REV., 20 MCGILL L.J. For a partial list of earlier articles see Laskin, *supra*, note 136; Strayer, *The Concept of Jurisdiction in Review of Labour Relations Board Decisions* (1963) 28 SASK. BAR REV. 157; Weatherill, *Labour Relations Boards and the Courts* (1966) 21 IND. RELATIONS 58; Carter, *The Apparent Virility of Privative Clauses* [1967] U.B.C. L. REV. 219; Norman, *The Privative Clause: Virile or Futile* (1969) 34 SASK. L. REV. 334.

lation that the board has stepped outside its jurisdiction by asking itself "the wrong question." Section 33 only comes into play where the board obeys the statutory commandment that it "shall exercise exclusive jurisdiction" to determine its own jurisdiction. In the absence of a specific threshold finding by the board that it has jurisdiction, section 33 does not come into play, but it is not clear that a *pro forma* finding by the board would satisfy this requirement. And if the board asks itself the "wrong" jurisdictional question, will its determination under section 33 be respected?

Second, representations made, somewhat equivocally, by the Attorney General in the course of debate suggest another possible route by which judicial review might be secured. Resisting an opposition amendment designed to specifically assure access to the courts, the Attorney General expressed the view that in the event of denial of natural justice, judicial review was still possible, notwithstanding the legislative language:

And when I suggest in this bill that the right to go to the courts in terms of a denial of natural justice is still present, I say that it's present in terms of all our inferior tribunals in the Province of British Columbia. . . . It isn't true to say that regardless of any error there is no access to the courts. . . . I don't think there is any privative section in this bill, is there? [Interjection] There is? Okay. Let's deal with this section, but let me just say this: in spite of that section, the rules of common law apply and the question of natural justice applies. . . . As I say, the unwritten laws of England apply to this inferior tribunal. . . .³⁰²

The Minister of Labour appeared to endorse this position:

The Attorney General has made the point very well. . . .³⁰³

Thus, it seems, at least from the perspective of legislative history, that there may be review on the grounds of denial of natural justice. But denial of natural justice is said to deprive a tribunal of jurisdiction.³⁰⁴ Should not section 33 therefore apply to the board's right to define its own jurisdiction on procedural as well as substantive grounds? An affirmative answer raises a yet more basic problem. Either section 33 precludes review on both procedural and substantive grounds — in which case the Attorney General seems to have erred, or it precludes review on neither ground — in which case the

³⁰² Hon. A. MacDonald, *DEBATES*, *supra*, note 1, at 926-27.

³⁰³ Hon. W. S. King, *id.*, at 927.

³⁰⁴ See, e.g., Finkelman, *supra*, note 264, at 1-2; Reid, *ADMINISTRATIVE LAW AND PRACTICE* (1971) 187; *Re Toronto Newspaper Guild v. Globe Printing Company* [1951] 3 D.L.R. 162 (ONT. H.C.) *per* Gale J., at 194.

Code is quite a different instrument than both the government and opposition believed.

The third difficulty with relation to section 33 may conceivably be the most serious. It is possible that a court may hold that the function of determining the jurisdictional limits of an inferior tribunal was historically vested in a "section 96" superior, county or district court, and that this function thus cannot constitutionally be assigned to a "non-section 96" tribunal. This possibility will be canvassed below.

C. *Constitutional Challenges to the Board's Exclusive Jurisdiction*

It is reasonably safe to predict that the new Code will, sooner or later, be subjected to constitutional challenge. At least three possible lines of attack can be anticipated:

- (a) there is a constitutional right of access to the courts for purposes of securing review of the board's decisions;
- (b) more narrowly, section 33 assigns to the board the power to define its own jurisdiction, a function analogous to that of a "section 96" court, thus violating the constitutional requirement for federal appointment of judges; and
- (c) the board's responsibility for controlling strikes and picketing is likewise a "section 96" function, and is similarly unconstitutionally assigned to it.

I shall examine each of these possibilities in turn.

Turning first to the argument that there is a constitutional right of access to judicial review, it would seem that this proposition is dubious at best. It had been advanced by a judge of first instance in *Farrell v. Workmen's Compensation Board*,³⁰⁵ brushed aside by the provincial appellate Court,³⁰⁶ and summarily rejected by the Supreme Court of Canada.³⁰⁷ Both the provincial appellate Court and the Supreme Court treated the point as well settled and dismissed the appellant's argument out of hand, citing a line of authority running back at least to 1923.³⁰⁸ It is thus somewhat surprising, at first blush, to be confronted with the suggestion by Professor Lyon, a distinguished scholar, that there is

³⁰⁵ (1960) 24 D.L.R. (2d) 272 (B.C.S.C.), *per* Manson J., at 276-77.

³⁰⁶ (1961) 26 D.L.R. (2d) 185 (B.C.C.A.), *per* Davey J.A., at 192.

³⁰⁷ (1961) 31 D.L.R. (2d) 177 (S.C.C.) *per* Judson J., at 180-81. See also *Woodward Estate v. Minister of Finance* (1972) 27 D.L.R. (3d) 608 (S.C.C.) *per* Martland J., at 613-14.

³⁰⁸ *Dominion Cannery Limited v. Horace Costanza and Others* [1923] S.C.R. 46.

... a constitutional requirement that certain kinds of questions — *legal* questions — be subject to ultimate determination, either by appeal or review, by courts of law manned by an independent judiciary...³⁰⁹

In terms of the weight of authority, Professor Lyon would seem to have a substantial onus of explanation to discharge. He does not so much challenge *Farrell* as seek to distinguish it. He speaks approvingly of the analysis of Laidlaw J.A. in *R. v. O.L.R.B., Ex Parte Ontario Food Terminal Board*³¹⁰ which failed to mention the Supreme Court's decision in *Farrell*, and which in any event was effectively demolished both by Professor Laskin³¹¹ and by McRuer C.J.H.C.³¹² On what authority, then, does Professor Lyon's contention rest? Essentially it rests on *Labour Relations Board of Saskatchewan v. John East Iron Works Ltd.*³¹³ which, he contends, "viewed as a whole ... rather than in fragmented snippets"³¹⁴ supports the proposition announced above. According to Professor Lyon, relying on the *Ontario Food Terminal* decision:

... a *pure question of law* ... cannot be finally and conclusively determined by a provincial labour relations board. This is a function reserved by section 96 to certain courts, and while the initial determination must necessarily be made by the board under the *mixed functions rationale* of *John East Iron Works Ltd.*, any attempt by the legislature to prevent, by privative enactment, ultimate recourse to a section 96 court on the pure question of law would run afoul of the purpose underlying sections 96-100 and therefore would be invalid.³¹⁵

The italicized words — "pure question of law" and "mixed functions rationale" — hold the key to Professor Lyon's view. As his discussion of *Farrell* makes clear,³¹⁶ it is the dilution of the board's duty to decide cases on the basis of "pure" law by the admixture of policy considerations which prevents the operation of section 96. Indeed, Professor Lyon goes so far as to distinguish workmen's

³⁰⁹ Lyon, *Comment* (1971) 49 CAN. B. REV. 365, at 368. Professor Lyon relies for this assertion on Lederman, *The Independence of the Judiciary* (1956) 34 CAN. B. REV. 769, 1139.

³¹⁰ (1963) 38 D.L.R. (2d) 530 (ONT. C.A.).

³¹¹ (Now Chief Justice of Canada). Laskin, *Comment* (1963) 41 CAN. B. REV. 446.

³¹² *R. v. O.L.R.B., Ex Parte Taylor* (1964) 41 D.L.R. (2d) 456 (ONT. H.C.), *aff'd* and leave to appeal to S.C.C. denied, (1964) 42 D.L.R. (2d) 320 n.

³¹³ [1948] 4 D.L.R. 673, [1949] A.C. 134 (P.C.).

³¹⁴ *Supra*, note 309, at 369.

³¹⁵ *Id.* [emphasis added].

³¹⁶ *Id.*, at 370 *et seq.*

compensation boards (and possible human rights commissions) from labour relations boards on this basis.³¹⁷

In my submission, his argument fails in general terms, and with specific reference to the British Columbia Labour Code.

In general terms, there is no basis in principle for the assertion of a constitutional right of access to the courts. Although Professor Lederman is acknowledged as the source of Professor Lyon's interpretation of section 96,³¹⁸ it is he who provides the analogy which underlines the improbability of the Lyon thesis. Commenting on the nature of free speech under our constitution, Professor Lederman has stated:

Freedom of expression is the residual area of natural liberty remaining after the makers of the common law and the statute law have encroached a little by creating inconsistent duties. . . .³¹⁹

Paraphrasing, one can only surmise that:

'Access to the courts is the residual area of protection remaining after the makers of the statute law have encroached a little. . . .'

As goes free speech, so goes judicial review. In a system of parliamentary government, it would be astonishing if the legislatures (and, even more so, the courts) could whittle down to the vanishing point the exercise of free speech which is so vital to the processes of a parliamentary democracy, while the courts retained an irreducible core jurisdiction not simply to referee constitutional battles, but to finally decide any millrun controversy so long as it is essentially "legal". This would give the courts a preferred position in our constitution wholly at odds with its basic premise of parliamentary supremacy.

Second, whatever may be its implicit assumptions, section 96 is an appointing power dealing with the judges of "superior, country and district" courts *in the provinces*. It says nothing about *federal* administrative tribunals nor does section 101 which speaks only to the establishment of additional federal courts and not to the appointment of their members. It seems clear (at least I am unaware of contrary authority) that the federal government could set up a tribunal identical in every respect to the British Columbia Labour Board without attracting the constitutional strictures of section 96.

³¹⁷ *Id.*, at 379.

³¹⁸ *Supra*, note 309.

³¹⁹ Lederman, *The Nature and Problems of a Bill of Rights* (1959) 37 CAN. B. REV. 4, at 8-9.

As the Supreme Court of Canada has held,³²⁰ and as the language of the Federal Court Act makes clear,³²¹ the federal government can prevent the provincial courts from reviewing federal agencies, and give as much or as little reviewing power as is thought wise to the federal courts, so long as the activity in respect of which the federal government asserts control is one which otherwise falls within its constitutional competence. Are the provincial governments subject to greater constraints in respect of provincially regulated activities? If (as appears to be conceded) the province can validly replace the prerogative writs with a new statutory form of review, if the scope of review can be broadened in some respects and narrowed in others, if jurisdiction to review can be assigned to a new court,³²² why cannot the province simply abolish the writs without establishing a statutory substitute, or narrow the scope of review to the vanishing point, or simply refuse to assign jurisdiction to review to any court? In short, is there a logically defensible and constitutionally significant distinction between legislating to limit judicial review and legislating to abolish it? I think not. As Laskin J. (as he then was) stated in *Pringle v. Fraser*:

This Court has held that *habeas corpus*, certainly as honoured a remedy as *certiorari*, takes its colour from the substantive matters in respect of which it is sought to be invoked, and its availability may depend on whether it is prescribed as a remedy by the competent legislature: . . . So too, *certiorari*, as a remedial proceeding, has no necessary ongoing life in relation to all matters for which it could be used, if competent excluding legislation is enacted.³²³

Third, Professor Lyon seems to concede that the provincial governments can abolish substantive legal rights, and substitute for them rules or policies which are not "pure law".³²⁴ They can clearly create new causes of action by legislation and alter or abolish causes of action developed by the common law. And if these drastic measures lie within provincial competence may they not also adopt the more modest measure of substituting administrative for curial decision-making?

It is the affirmative answer given to this last question by the *John East* case which brings us to the meat of the matter: what is the

³²⁰ *Pringle et al. v. Fraser* (1972) 26 D.L.R. (3d) 28 (S.C.C.).

³²¹ Federal Court Act, S.C. 1970-71-72, c. 1, ss. 18 and 28.

³²² See the Judicial Review Procedure Act, S.O. 1971, c. 48.

³²³ *Supra*, note 320, at 32.

³²⁴ *Supra*, note 309, at 370.

critical constitutional difference between a court and an administrative tribunal? Pointing out that section 96 requires not only federal appointment, but as well legal qualifications for tribunal members, the Privy Council asks whether

... if trade unions had in 1867 been recognized by the law, if collective bargaining had been the accepted postulate of industrial peace ... it would not have been expedient to establish just such a specialized tribunal as is provided by ... the [Saskatchewan Labour Relations] Act. It is as good a test ... to ask whether the subject-matter of the assumed justiciable issue makes it desirable that the judges should have the same qualifications as those which distinguish the judges of superior or other courts. ...³²⁵

Referring to the "experience and knowledge acquired extrajudicially" required of board members,³²⁶ the Privy Council rejects the proposition that section 96 appointments are required. Contrary to Professor Lyon, I believe that it is this factor which explains *John East*, and not the issue of "mixed functions." And needless to say, the very considerations which swayed the Privy Council in *John East* are present in the British Columbia Labour Code; the Code is virtually identical to the Saskatchewan labour relations statute sustained in that case.

It must be conceded, as Professor Lyon notes,³²⁷ that the Privy Council, *obiter dicta*, expressed some diffidence about the privative clause in the Saskatchewan Act. However, whereas he treats this as a general constitutional caveat about privative clauses, I read the Privy Council as offering views on the effect of the particular language before it.³²⁸

Does anything, finally, turn on distinctions between the Labour Relations Board and workmen's compensation boards, which might explain why the former may merely be provincially constituted, while the latter may also be immunized from judicial review? The Privy Council refused to make any such comparison.³²⁹ But the

³²⁵ *Supra*, note 313, at 150-51.

³²⁶ *Id.*

³²⁷ *Supra*, note 309, at 367-68, n. 15.

³²⁸ *John East* case, *supra*, note 313, at 151-52:

But the same considerations which make it expedient to set up a specialized tribunal may make it inexpedient that that tribunal's decisions should be reviewed by an ordinary court. It does not for that reason become itself a "superior" court. Nor must its immunity from certiorari or other proceedings be pressed too far. It does not fall to their Lordships on the present appeal to determine the scope of that provision, but it seems clear that it would not avail the tribunal if it purported to exercise a jurisdiction wider than that specifically entrusted to it by the Act.

³²⁹ *Id.*, at 152.

Supreme Court of Canada relied *inter alia*, upon *John East* in deciding *Farrell*, and held that:

If an argument based upon s. 96 of the *B.N.A. Act* is untenable, the other argument based upon right of access to the Court's falls with it. . . . Short of an infringement of this section, if the legislation is otherwise within the provincial power, there is no constitutional rule against the enactment of [the privative clause].³³⁰

The Supreme Court, apparently, did not share Professor Lyon's views about the distinction between the two tribunals.

Turning next to the specific provisions of the Code, its privative clause would seem to be valid even if one accepts Professor Lyon's broad thesis that

. . . the constitutional rationale of sections 96-100 continues to require that labour relations boards decide questions of law according to established legal principles. . . .³³¹

As the legislative debates make clear, the intention of the Code was to reduce legalism in the decision of labour controversies. This intention is reflected in many ways: the use of settlement procedures under the board's auspices for unfair labour practices³³² and grievances;³³³ the promulgation of "general policies . . . for the guidance of the general public and the board" (albeit within the terms of the Act, and without binding effect);³³⁴ the use of declaratory opinions;³³⁵ and the power to refuse relief³³⁶ or to grant conditional relief,³³⁷ in order to balance the equities between the parties. All of these important, innovative powers indicate that much of what the board is doing is more varied and complex, and decidedly different, than "deciding" cases, much less deciding them "according to established legal principles." Even in the decisional process, the board has a broad-ranging mandate to develop its record in ways quite unfamiliar to any court: it may examine records, machinery and premises; conduct votes³³⁸ and delegate powers of investiga-

³³⁰ *Supra*, note 307, at 181.

³³¹ *Supra*, note 309, at 371.

³³² The Code, s. 8(2).

³³³ *Id.*, s. 97.

³³⁴ *Id.*, s. 27(1).

³³⁵ *Id.*, ss. 38, 40.

³³⁶ *Id.*, s. 91.

³³⁷ *Id.*, s. 29.

³³⁸ *Id.*, s. 35(d)-(i).

tion,³³⁹ and decision;³⁴⁰ and settle the conditions of a first agreement between the parties on the basis of statistical comparisons.³⁴¹

Can the decision of "questions of law according to established legal principles" be antiseptically separated from this network of interacting powers and procedures without doing violence to the whole flexible scheme of the Code? I suggest that the Code (to borrow two of Professor Lyon's phrases) "viewed as a whole . . . rather than in fragmented snippets" cries out for the "exclusion of strict law,"³⁴² no less than the explicit language of the workmen's compensation statute³⁴³ which is conceded by him to justify the private clause in *Farrell*.

I reiterate my view, then, that the Code cannot be constitutionally impugned on the ground that it largely or entirely eliminates judicial review. This is not to say, however, that the particular method by which this result is sought is necessarily valid.

Section 33, which gives the board power to determine the extent of its own jurisdiction, may be open to the objection that it assigns section 96-type functions to the board. On this argument, it was the task of superior courts in 1867 to define the jurisdiction of inferior tribunals, and this task cannot be assigned to another body which is not appointed in accordance with section 96.

This was, in essence, the reasoning of the Supreme Court of Canada in its unanimous decision in *Seminary of Chicoutimi v. A.G. of Quebec et al.*³⁴⁴ The Court there struck down a statute conferring upon the Quebec provincial courts power to quash municipal by-laws on the grounds of illegality, on the ground that

[O]n the eve of Confederation the Superior Court still exercised . . . the special jurisdiction . . . to exercise a superintending and reforming power and control over Courts of inferior jurisdiction and . . . municipal corporations. . . . [T]he jurisdiction conferred by the legislative provisions the constitutionality of which is now being challenged is not, in a general way, in conformity with the kind of jurisdiction exercised in

³³⁹ *Id.*, s. 35(j).

³⁴⁰ *Id.*, s. 17.

³⁴¹ *Id.*, s. 71(b).

³⁴² *Supra*, note 309, at 370.

³⁴³ Workmen's Compensation Act, S.B.C. 1968, c. 59, s. 82:

The Board is not bound to follow legal precedent; its decision shall be given according to the merits and justice of the case and, where there is doubt on any issue and the disputed possibilities are evenly balanced, the issue shall be resolved in accordance with that possibility which is favourable to the workman.

³⁴⁴ (1972) 27 D.L.R. (3d) 356 (S.C.C.).

1867 by the Courts of summary jurisdiction, but conforms rather to the kind of jurisdiction exercised by the Courts described in s. 96.³⁴⁵

From this perspective, section 33 may well be vulnerable.

However, the section may be viewed in another light. The Labour Relations Board does not claim a general "superintending and reforming power and control" over the decisions of other tribunals, or even over its own decisions. To be sure, the board is given the right to make binding decisions on questions of law respecting the interpretation of the Code,³⁴⁶ but these decisions are not necessarily concerned with jurisdictional issues. In the same vein, the board's power to reconsider, vary and cancel its own decisions³⁴⁷ is not limited to jurisdictional issues. These are more general powers, no doubt partly designed to avoid error, partly to permit error to be corrected, and partly to assure that correct decisions can be altered when underlying circumstances change. When, in the exercise of these powers, the board deals with jurisdictional issues, it is as an incident of its general obligation to administer the Code, and not as a discrete task assigned to it rather than to a section 96 court. The board is exercising original, rather than "superintending and reforming," jurisdiction.

Which of these two views a court would accept is problematic, but I would suspect that an attack on section 33 would have some reasonable chance of success. It is easy enough to understand, however, why the draughtsmen sought to give the board power to define its own jurisdiction. The Supreme Court, at least since *Farrell*, has been prepared to concede that so long as the board is acting within its jurisdiction, it has the right to be wrong on questions of fact and of law.³⁴⁸ If (as I have suggested) the Court has tended to go to extreme lengths to find jurisdictional error in order to circumvent its own self-denying ordinance,³⁴⁹ it is predictable that a legislature should take equally extreme measures to force the Court to live by its own rules.

³⁴⁵ *Id.*, at 359-64, *passim*.

³⁴⁶ The Code, s. 16.

³⁴⁷ *Id.*, s. 36. The board has laid down some guidelines limiting the exercise of its "almost unlimited" power to reconsider its own decisions. Essentially, the board will be reluctant to reconsider factual matters, more amenable to reconsideration of "conclusions of law or general policy." See *Burnaby v. C.U.P.E., Local 23* [1974] 1 CANADIAN L.R.B.R. 128 (B.C. L.R.B.).

³⁴⁸ See, e.g., *Noranda Mines v. The Queen et al.* (1969) 7 D.L.R. (3d) 1 (S.C.C.).

³⁴⁹ I believe that Prof. Lyon and I are in agreement on this point; see *supra*, note 309, at 379.

Perhaps instead of giving the board exclusive power under section 33 to define its own jurisdiction, the Legislature could have denied to the court jurisdiction to determine whether the board acted within its jurisdiction. This explicit commandment addressed in unmistakable language to the court, would have accomplished the same result, without raising the section 96 problem. If such a provision had been incorporated in the Supreme Court Act,³⁵⁰ its effect might have been made yet more certain, because the Legislature would then be seen to be not so much expanding the board's jurisdiction (even by negative implication) as limiting that of the courts.

This approach, of course, is suggested by what I have earlier described as a "network" of defensive provisions complementing the Code's three privative clauses, by ousting the courts' original jurisdiction over matters consigned to the board. Specific reference should be made to two types of provisions. First, there are those which provide that "no action lies"³⁵¹ in respect of certain conduct, or that conduct "is not actionable."³⁵² Second, there are those which deprive the court of

... jurisdiction in respect of a matter that is, or may be, the subject of a complaint under [the section empowering the board to give relief] or a matter [relating to strikes and picketing], and, without restricting the generality of the foregoing, no court shall make an order enjoining or prohibiting any such act or thing ... in support of a claim for damages.³⁵³

Both types of provisions seem constitutionally invulnerable. It can hardly be argued that section 96 is offended either by abolishing a cause of action or by abolishing, or rendering unavailable in defined circumstances, a particular remedy.

This leaves for consideration only a possible challenge based on the notion that the board's power to order that workers refrain from striking or picketing³⁵⁴ is illicitly analogous to a "section 96" court's power to enjoin striking or picketing. Such an argument ought not to succeed.

The test of jurisdiction, as the Privy Council has pointed out, is not whether the board is deciding an issue which is "justiciable", but rather whether such an issue is one "which [was] familiar to the

³⁵⁰ The Supreme Court Act, R.S.B.C. 1960, c. 374, ss. 9 and 10.

³⁵¹ The Code, s. 87.

³⁵² *Id.*, s. 89.

³⁵³ *Id.*, s. 31(2).

³⁵⁴ *Id.*, s. 28.

courts of 1867.³⁵⁵ Injunctions against picketing and strikes were unknown to the courts of that period, and in fact would have offended against certain substantive doctrines accepted by the courts until relatively recently, especially in relation to attempts to prevent work stoppages by forcing employees to go to work. In *I.B.E.W. v. Winnipeg Builders' Exchange*,³⁵⁶ Cartwright C.J.C. quoted with approval³⁵⁷ the words of Monnin J.A. in the Manitoba Court of Appeal, when the latter declined to defer to equity's long-standing rule against enforcing contracts of personal service:

The complexity of labour-management relations in a highly industrialized civilization were presumably not even thought of by Lord St. Leonards, L.C., when he had to decide whether [to enforce a contract of personal service in *Lumley v. Wagner* (1852) 42 E.R. 687].³⁵⁸

What Lord St. Leonards L.C. had not thought of in 1852, his Canadian judicial brethren had not yet encountered by 1867; the modern regulation of labour-management relations in aid of collective bargaining still lay decades in the future.

If not in 1867, then shortly thereafter,³⁵⁹ the courts did assert an equitable jurisdiction to enjoin picketing on the basis of common law rules, such as the torts of nuisance, conspiracy, and inducing breach of contract. But it must be remembered that the board does not purport to administer common law rules, nor even a statutory codification of such rules. The board is regulating strikes and picketing to secure compliance with a statutory scheme of industrial relations designed to strike a reasonable balance of power between the contending parties and to protect a congeries of public interests. As my earlier discussion indicated,³⁶⁰ the common law is left largely intact and in the hands of the court, except to the extent that conduct is regulated by the Code as a matter of substantive law. In the event of a potential conflict between two sets of legal rules operating upon the same conduct, the legislative rules of course prevail. But it is legislative rules and not common law which the board administers.

The analogy to *John East* is virtually perfect. The Privy Council

³⁵⁵ *John East* case, *supra*, note 313, at 150.

³⁵⁶ (1967) 65 D.L.R. (2d) 242 (S.C.C.), *aff'g.* (1966) 57 D.L.R. (2d) 141 (MAN. C.A.).

³⁵⁷ (1967) 65 D.L.R. (2d) 242, at 250.

³⁵⁸ (1966) 57 D.L.R. (2d) 141, at 157.

³⁵⁹ The first recorded use of the labour injunction in Anglo-Canadian jurisprudence was *Springhead Spinning v. Reilly* (1868) L.R. 6 Eq. 551.

³⁶⁰ See *supra*, part II G, *The Rules of Economic Conflict*.

there sustained the board's power to order reinstatement of an employee discharged contrary to the Act, and rejected the provincial appeal court's holding that

... the Board exercised a judicial power analogous to that of [section 96] courts ... on the ground that such Courts always had jurisdiction in connection with the enforcement of contracts of hiring and awarding damages for the breaches thereof.

And they continued:

But ... this view ignores the wider aspects of the matter. The jurisdiction of the Board ... is not invoked by the employee for the enforcement of his contractual rights: those, whatever they may be, he can assert elsewhere. But his reinstatement, which the terms of his contract of employment might not by themselves justify, is the means by which labour practices regarded as unfair are frustrated and the policy of collective bargaining as a road to industrial peace is secured. It is in the light of this new conception of industrial relations that the question to be determined by the Board must be viewed, and, even if the issue so raised can be regarded as a justiciable one, it finds no analogy in those issues which were familiar to the Courts of 1867...³⁶¹

The Supreme Court of Canada has accepted this analysis in *Tremblay v. La Commission des Relations du Québec et al.*³⁶² in relation to the power of a labour relations board to dissolve an employer-dominated trade union. It is difficult to resist the conclusion that the same result would follow in relation to the British Columbia board's powers to regulate strikes and picketing.

IV. CONCLUSION

Otto Kahn-Freund, the distinguished British labour law scholar, has reminded us on more than one occasion to be restrained in our enthusiasm for legal solutions. He has said:

Altogether, the longer one ponders the problem of industrial disputes, the more sceptical one gets as regards the effectiveness of the law. Industrial conflict is often a symptom rather than a disease. I think we lawyers would do well to be modest in our claims to be able to provide cures.³⁶³

It is paradoxical that "the dullest bill" is the most ambitious Canadian labour relations statute, in the sense that it is the most all-

³⁶¹ *Supra*, note 313, at 150.

³⁶² [1967] S.C.R. 697.

³⁶³ Kahn-Freund, *LABOUR LAW: OLD TRADITIONS AND NEW DEVELOPMENTS* (1967) 79.

embracing and carefully integrated code of labour laws, but yet is one of the most modest statutes, in the sense of Professor Kahn-Freund's admonition. Whether they have accomplished their purpose or not, it is evident the architects of the Code intended not so much to provide "cures" as to urge, cajole, even coerce, the parties, in their own interest and in the public interest, to exercise self-restraint and to practise mutual accommodation. A worthy, if unlikely, enterprise.